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# Articles

## From an Insurrection

Richard K. Neumann, Jr.\*

A window slowly opens on the shimmer  
Of night battling with the rising sky.  
Prague, far away, is rosy pink and glimmers.  
— Seifert<sup>1</sup>

### I. NOVEMBER

The event was called the Massacre even though no one died. Some students—marching peacefully down a boulevard and demanding certain rights not enjoyed in their country for many years—were set upon by police. The students were armed with nothing. The police had clubs, tear gas, and dogs, and in their vanguard was a special squad trained to storm airplanes taken over by terrorists. As they were being surrounded by all these forces, the students knelt and sang, among other things, “We Shall Overcome” in their native language. Then the police attacked.

A monument was later erected on the spot, and even now people leave flowers and lighted candles there daily. It is a bronze sculpture of several

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1. J. SEIFERT, *MOZART IN PRAGUE* (P. Jagasich & T. O'Grady transl. 1985) (rondel VI).

hands reaching upward—some open to prove that they hold no weapons, others in the two-finger gesture that conveys a hope for peace. To a passerby unaware of the history of the place, the only explanation is an engraved date: November 17, 1989.

That was a Friday. The next day a few thousand students held a hesitant demonstration, and stage theaters began to strike. Museums and the philharmonic soon followed. On Sunday, ten thousand people demonstrated. On the same day, a group of activists met in a theater down the street from the site of the Massacre, and Civic Forum was formed. On Monday, 200,000 people—largely students and other young people—assembled in the heart of the city, and that night students shut down the university. The leader of the Party in power accused the organizers of this demonstration of trying to drag the country into “chaos and anarchy.” But Civic Forum announced plans for a nation-wide two-hour general strike to occur a week later—a strike that would fail unless the blue-collar class were to join it. The workers had never taken part in anything like this before, and the whole idea seemed nearly quixotic.

Students went through telephone books and other directories and developed a computerized list of nearly all the factories in the country. Student volunteers were organized into teams, coordinated by computer, and dispatched to the factories, sometimes joined by actors. Some were assaulted as soon as they arrived by workers who were loyal to the regime or who feared the kind of economic disintegration that was then happening in Poland.<sup>2</sup> Management was determined to keep the students out of the factories, and students often had to be smuggled onto the premises.

“Your own children are being beaten or will soon be beaten,” the students told the workers. Some of your children are among us in Prague. And those who are not will eventually be beaten right here because if the regime can do this to us in Prague, they will do it to young people anywhere. We want the officials responsible for this found out and brought to justice. And we want to make sure that this will never happen again.

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2. In East Central Europe, “[w]orkers tend to react to the idea of economic reform with a wariness rooted in natural conservatism and reinforced by a lack of information” and by a refusal “to jeopardize security and stability for the sake of greater but also riskier material gains.” Pravda, *Industrial Workers: Patterns of Dissent, Opposition, and Accommodation* in OPPOSITION IN EASTERN EUROPE 209, 216 (R. Tokes ed. 1979). When the prior regimes in that region considered even timid economic reforms in earlier years, the workers usually reacted with suspicion and with demands for the continuation or reimposition of rigid centralized planning. *Id.* at 216-18. Workers were especially hostile to any change that might tie “wages to enterprise performance or profitability,” allow prices to rise according to market conditions, or reduce featherbedding (and thus introduce the possibility of unemployment). *Id.* at 217. Arguments that any of these things could cause economic efficiency were heard by the workers to mean that they would be required “to work harder to earn the same wages.” *Id.* “Modest price increases of the order of three per cent [were] greeted with alarm,” *id.*, and for several decades in Poland significantly greater increases usually led to riots. “As one Czech worker put it in 1968, only fools would exchange security for the unknown.” *Id.* at 216.

(Often, these arguments were supplemented with videotapes of the Massacre, copied en masse from a few originals.)

Although these presentations deeply affected the workers, the initial response was disappointing. The workers believed that nothing could be changed for the better; they feared that a breakdown of the regime would lead to economic chaos; and they forcefully told all this to the students. Imagine these scenes: students who a week before had been sitting in classes without any intention of making an uprising were now standing on shop floors, trying to persuade crowds of workers to take an action that would be treated as the equivalent of treason. The workers peppered these students with counter-arguments and skeptical questions, which the students had to be able to answer convincingly on the spot. The students could hardly afford to be unpersuasive: they all knew that if this strike failed, they themselves would be dismissed from the university and blacklisted from all work except manual labor, and many of them would be imprisoned.

When workers reiterated the regime's argument—which was being broadcast on television and radio—that the students were trying to destroy the economy, a student might walk over to the nearest machine and ask, "How old is this? The plaque on it says it was made in 1957. When it was new, how old were each of you? How many shifts do you work in this factory? One? When is the last time this factory had enough work for two shifts? Can any of you remember when you worked three shifts? The regime is the one that is destroying the economy. They don't give you the equipment you need to do the job, and then they can't sell enough of your product to keep you fully employed. Production is falling in other factories, too, although the regime is trying to hide that from you. They will lie to you to stay in power. They caused these problems, and now they can't solve them. That is why the only way to prevent economic chaos is to join our strike."

In one of the largest industrial complexes in the country, an official of the regime was filmed lecturing to hundreds of workers on the theme of the naiveté of student agitators. The workers were wearing overalls and the like, and the official, in a suit, spoke from an imperious balcony high above them. In the past, when the regime's representatives had spoken from platforms or balconies like this, they were accustomed to respectful silence, and when they were finished, certain members of the audience would rise and promise that everyone would make extra efforts to meet the regime's production goals or to do whatever else the regime wanted of them. But this time the workers erupted with cries of "*You're naive! You're naive!*" In shock and bewilderment, the official stepped backward and looked into the camera helplessly as the workers chanted "*Resign! Resign!*"

In Prague, the demonstrations were growing larger. They began at

four in the afternoon so that working people could protest on the way home. On Tuesday, the fourth day after the Massacre, 200,000 people demonstrated. On Wednesday and Thursday, 250,000. On Friday, 350,000. On Saturday, in bitter cold, 500,000 to 800,000—a third to a half of the city's population. And on Sunday, the day before the general strike was to occur, 500,000. There was not a single instance of a protestor's committing even the smallest act of violence, and consequently the police became confused. In a vague way, they recognized the moral force of the demonstrators' peacefulness, but they had no strategy that could respond to it. After the Massacre, the police generally refrained from beating people, but when they came across small groups of protestors, they arrested everyone they could (although for lack of cells the arrestees were likely to be released after a few hours). Six or seven days after the Massacre, even the arrests stopped, and the police seemed to recede entirely. During the week of huge demonstrations, the regime tried to contain the situation by replacing the Party general secretary and the bulk of the politburo, but the demonstrators were already demanding more: abolition of required courses in Marxist-Leninist thought, an end to the Party's leading role, free elections.

At the university,<sup>3</sup> students had formed strike committees and had occupied the main buildings, bringing sleeping bags with them. Because so much had to be done so quickly, and because of the risk that the police might mount a surprise attack in the middle of the night, students were at work twenty-four hours a day. They had the support and assistance of many teachers scattered throughout the university, generally more often in the arts (such as drama) and in fields without political content (such as mathematics) than in fields which the regime had treated as ideological (such as law).

Signs proclaiming "General Strike" began to appear in windows everywhere, in homes, shops, and offices—even government offices. The strike began at noon on Monday, November 27, and it was clear within minutes that the entire country had been shut down. Not a thing was being manufactured, sold, or repaired anywhere. And in the succeeding two hours, workplaces were scenes of exuberant civil disobedience. Workers made speeches to their colleagues, and protest songs were sung. Revolutionary documents were read aloud. In a Prague brewery—and probably in a lot of other places as well—someone stood on a platform and read from the

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3. What Americans sometimes call the University of Prague is actually Charles University, founded in 1348 by its namesake, Charles IV, and one of the oldest universities in Europe. There are also universities in Bratislava, Brno, and Olomouc, all of which were also quickly shut down. The last time any of these institutions had been closed for political reasons was in 1939, by the Nazis, in reprisal for student protests against the occupation. (Except for Bratislava, they were closed throughout the war.) In November 1939, the Nazis executed a number of student leaders, and the demonstration that ended in the Massacre had begun as a commemoration of the fiftieth anniversary of that event.

American Declaration of Independence about "certain inalienable Rights" among them "Life, Liberty, and the Pursuit of Happiness." On the following day, the regime surrendered and began to transfer power to Civic Forum.

## II. BEFORE NOVEMBER

Americans tend to section their political memories into four-year—or, in the case of reelected presidents—eight-year intervals that come and go with the reliability of the natural seasons. No such rhythm exists in the political memories of countries that lack an unbroken history of regularly scheduled elections. Instead, a static line of existence is punctuated not by routine rotations of officeholders, but instead by cataclysmic events that are recalled by specific dates or by names intended to convey an interpretation (and often used for ironic effect even by those who hold contrary views). Thus, Czechs and Slovaks divide their recent past into that which existed before November 17 and that which has existed afterward. The period that ended on November 17 began with "the February events" of 1948, and its only interval of hope was cut short by the "entry of the fraternal armies" in August, 1968 and the "normalization" which followed.

After the entry of the fraternal armies, there were several months of borrowed time in which people continued to have the option of speaking and acting freely but knew that their behavior was being observed. During the same period, the Party leadership was quietly examined and purged. Once in place, the new leadership conducted what it called "normalization": every person known to have actively supported the reforms of the Prague Spring was gradually removed from any job in which he or she might be able to harm the cause of socialism.

The normalizers were quick to dismiss people with "independence of mind, generosity, tolerance, excessive education, high moral principles, aversion to officialese, courage, and so on."<sup>4</sup> Scholars, journalists, and managers were reduced to washing windows for a living or doing construction work or carrying tourists' suitcases in hotels,<sup>5</sup> creating vacancies to be filled by people distinguished for their "obedience, loyalty,

4. M. SIMECKA, *THE RESTORATION OF ORDER: THE NORMALIZATION OF CZECHOSLOVAKIA 1969-76*, at 41 (1984).

5. This was the second mass purge in modern Czechoslovak history. The first, in 1948 and succeeding years, was worse: anyone from a bourgeois background was forced out of responsible work. This was taken to such an extreme that the children of shopkeepers were not allowed to attend university. During the years 1948-50, 13% of the university professors and 6% of the docents were purged, but among law school teachers (of all ranks) the figure exceeded 90%. Z. KRYSTUFEK, *THE SOVIET REGIME IN CZECHOSLOVAKIA* 100 (1981). "Some of [their replacements] did not have any legal or other university education," although they were, of course, ideologically pure. *Id.* For many years before 1989, nearly all of the teachers at the law school in Prague had been members of the Party in power. Not all Party members actively supported the regime; some joined because membership was expected of them. Students tended to distinguish not between Party and non-Party teachers, but instead between those who were "compromised" and those who were not.

dependability, mediocrity, respectability, caution, [and] moral weakness.”<sup>6</sup> “An era of apathy and widespread demoralization began. . . . Society was atomized, small islands of resistance were destroyed, and a disappointed and exhausted public pretended not to notice. Independent thinking and creation retreated to the trenches of deep privacy.”<sup>7</sup> What flourished was “passivity, opportunism, . . . cynicism, [and] an exclusive concern with cultivating such ‘private’ concerns as career and family life.”<sup>8</sup>

A small but significant number of able and principled people survived in what became known as the “grey area”: through one stratagem or another (and often through accident<sup>9</sup>), they were able to remain in responsible positions without compromising themselves. Some came of age after the normalizers had become less vigilant; others worked in fields considered so innocuous that the normalizers gave them a more cursory examination.

In the universities, normalization produced a large group of teachers<sup>10</sup> who had only the shallowest understanding of their subjects: not only were they unable to add to their field’s body of theory, but it was clear even to students that many of them did not know some of the basic descriptive material to be found in textbooks. And the normalizers were particularly diligent at cleansing law school faculties. Law, after all, is full of political content, and thought about law was therefore always kept under tight control. Law students were required to take courses entitled “Marxist Philosophy,” “Marxism-Leninism,” “Scientific Communism,”

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6. SIMECKA, *supra* note 4, at 41.

7. V. HAVEL, DISTURBING THE PEACE 119-20 (1990). East Central Europeans call such a retreat “internal emigration.”

8. Keane, *Editor’s Preface* to V. HAVEL, *THE POWER OF THE POWERLESS: CITIZENS AGAINST THE STATE IN CENTRAL-EASTERN EUROPE* 8 (J. Keane ed. 1985). (Together with so much lying that “living the truth” later became a revolutionary slogan; this is the still-debilitating wound that East Central Europeans call “the degradation of values.”)

It was not the tanks and infantry of the fraternal armies that crushed . . . the Czechoslovak people’s aspiration to a democratic way of life, but the bureaucrats in charge of personal files at every level, who wielded the power to issue dismissal notices, reorganize or redeploy the work force [and] provide damning character references. . . . Everything was carried out virtually unseen . . . without arousing large-scale reaction among world public opinion.

SIMECKA, *supra* note 4, at 66.

9. For example, a person who happened to be out of the country doing research during the critical months in 1968 would not have had an opportunity to commit the kinds of acts that would have attracted the attention of the normalizers.

10. To Europeans, the words *professor* and *faculty* do not mean what they do to us, and in this article the word *teachers* is used instead when discussing European universities. In Europe, a faculty is an academic department, and a law faculty is a law school’s entirety as an institution (and not merely its teachers). In most countries, only a very small proportion of those teaching in universities are professors. Non-professorial teachers hold titles such as *docent*, and many have the equivalent of tenure. In Europe the word *professor* has connotations of personal authority and empire-building that can evoke strong political reactions. In some countries, particularly Germany, a professor is a person around whom the teaching and scholarship of other teachers is organized. See Neave & Rhoades, *The Academic Estate in Western Europe* in *THE ACADEMIC PROFESSION* 211, 215 (B. Clark ed. 1987); *UNIVERSITIES, POLITICIANS AND BUREAUCRATS: EUROPE AND THE UNITED STATES, passim* (E. Shils & H. Daalder ed. 1982) [hereinafter, *UNIVERSITIES*].

"Scientific Atheism," "Defense of the Socialist State," and "History of the International Communist Movement and of the Communist Party of Czechoslovakia."<sup>11</sup> In the regime's early years, the classroom teaching of law was so politicized that students played a game like one sometimes played in American law schools: "Each participant chose a word he expected the teacher to repeat most often during [class]. The favorite horses were 'comrades,' 'world peace,' 'exploitation,' 'socialism,' 'communism,' 'capitalism,' 'class struggle,' and 'class enemy.' . . . Once I wagered on 'socialism.' The lecturer used the word seventy-two times, but I still lost by two points to a classmate who had backed 'comrades.'"<sup>12</sup>

Before the regime came to power in 1948, Czechoslovak universities had operated in the mainstream of the Central and Western European traditions of higher education. Among all the changes introduced thereafter was one from the Russian tradition that is not well understood in the West: the research and theorizing function of the university was separated from the teaching function and diverted to a parallel system of institutes centered around the Czechoslovak Academy of Sciences.<sup>13</sup> A university teacher was only a teacher—to the exclusion, if necessary, of scholarly interests. Although a teacher was not flatly prohibited from publishing, the resulting material was hardly voluminous, and among teachers favored by the regime it rarely rose above the level of the descriptive.<sup>14</sup>

11. For the complete curriculum, see Glos, *Czechoslovakia* in 8 MODERN LEGAL SYSTEMS CYCLOPEDIA 87, 97-98 (K. Redden ed. 1985). For a similar curriculum, used before 1990 in all East German law schools, see D. MEADOR, IMPRESSIONS OF LAW IN EAST GERMANY: LEGAL EDUCATION AND LEGAL SYSTEMS IN THE GERMAN DEMOCRATIC REPUBLIC 72-88, 238-43 (1986).

12. O. ULC, THE JUDGE IN A COMMUNIST STATE 6 (1972).

13. The Soviet Academy of Sciences, on which the Czechoslovak Academy was modelled, is descended from the St. Petersburg Academy of Science, founded in 1725 by Peter the Great to stimulate Russia to catch up technologically with the West. A. VUCINICH, EMPIRE OF KNOWLEDGE: THE ACADEMY OF SCIENCES OF THE USSR 6-17 (1984). For similar purposes, the Soviets later invested enormous resources in their Academy, *id.* at ix, 123-313, and encouraged their client governments in other countries to do something similar. When the Soviets refer to someone as "Academician Sakharov" or "Academician Lysenko," they do not mean that he or she is a scholar-teacher in a university; the honorific means instead that its holder is a member of the Academy and therefore employed full-time on Academy research. The institutes under the umbrella of the Czechoslovak Academy include many that are concerned with fields not considered "scientific" in the West. They include institutes on—among other things—literature, history, art, ancient cultures, philosophy, and law.

14. Although a similar Academy structure was used in East Germany, university teachers there continued to do research because of the strong German tradition of university scholarship — the same tradition that in the last century inspired the American concept of a university, see R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 367-412 (1955). But East German university teachers were not free to pursue whatever research interests pleased them. They were assigned research topics "pursuant to a centrally devised state plan." MEADOR, *supra* note 11, at 96, 98. The Ministry for East German Higher Education formulated a different research plan for each law school, coordinated to produce data needed for the "realization of socialism," and every law teacher was expected to devote about 30 per cent of his or her professional time to fulfilling the law school's research plan. *Id.* at 96-97. Any research outside the plan would have to be done at night and on weekends and, because it would have been unofficial, would not be favored for publication. *Id.* at 97.



After normalization was complete, a person in the grey area still attached to an institute had a reasonable chance of surviving indefinitely—as long as he or she did not try to publish anything that would alarm the regime. Most of the work in an institute would be done alone or with a limited number of colleagues, and that made safety easier to obtain. But a Czechoslovak university teacher typically lectures in the classroom up to twenty hours a week, and in any given class some students might be quite ready to report a teacher's inadvertent indiscretion to the secret police.<sup>15</sup>

### III. AFTER NOVEMBER

In December, university committees were formed to restructure curricula. It would not have been enough merely to have deleted the mandatory courses in Marxism-Leninism. In every field that conceivably could have had ideological content, the regime had distorted the available body of thought, teaching what it liked—often with preposterous interpretations—and ignoring or lying about the rest. Not only did some courses have to be deleted, but others needed to be added and still others redesigned. Even after the Marxism-Leninism courses had been eliminated, each remaining required course was reexamined to see whether it should become optional, and distribution requirements had to be similarly reworked.

At least in Prague, these committees were composed of teachers and students in equal numbers and with equal voting rights. They could not spend years on this work, as such committees do in the United States. People who have risked their futures in an insurrection have no patience for the glacial pace that American academics wrongly assume to be inherent in collegial decision-making. Much—but not all—of the curricular reform had to be and was accomplished before students returned in January from the break between academic terms.

As East Central European teachers and scholars reestablish complete intellectual ties with the West (a gradual process which will take several years), their curricula will have to go through a profound evolution. In Czechoslovak law schools, for example, even those aspects of law that the regime considered nonpolitical will have to be overhauled because they have been and still are taught in the purest kind of formalism and legal positivism—without any of the interdisciplinary insights that began with legal realism.<sup>16</sup>

15. M. Prochazka, *Denunciation as a Literary Genre*, paper delivered at the NYU Conf. on Czech Lit. & Culture, (Mar. 21, 1990). See *infra* note 148. Even well-meaning students could feel that they were being put in a terrible position if a teacher were to say, in their presence, something arguably subversive: Was this a “provocation” (an event staged to test how they would react)? If they failed to inform on the teacher, were their own futures in jeopardy?

16. See *infra* notes 66-67 and accompanying text. Because Czechoslovak law teachers and lawyers have virtually no knowledge of any of the intellectual movements that have stirred up

European universities are headed by rectors, rather than by presidents or chancellors. By long-standing tradition throughout Europe, rectors are elected for terms of office, usually by a representative body—such as an academic senate—which is the primary source of university governance.<sup>17</sup> In most countries, rectors are not imposed from above by a board of non-scholar trustees or regents.<sup>18</sup> The tradition of electing rectors had not been observed by the regime, and after the November upris-

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Anglo-American legal education for many years, attempts by an American to describe clinical education, feminist jurisprudence, law and literature, and the like can lead to conversations that are indescribably surreal and bittersweet.

17. Depending on the country, the representative body might in turn be elected by senior teachers, by all teachers, or by teachers and students. See the following:

*Belgium:* Verhoeven, *Linguistic Communalism, Bureaucratization and Democratization in UNIVERSITIES*, *supra* note 10, at 125, 153-54.

*Britain:* MOODIE & EUSTACE, *POWER AND AUTHORITY IN BRITISH UNIVERSITIES* (1974). (British terminology and governance structure differ from that used on the continent, but the net effect is comparable. Although British universities have chancellors, their "position is very largely . . . ceremonial." *Id.* at 91. The real chief executive officer of a British university is the vice-chancellor, who is customarily chosen by a joint committee of the academic senate and the university council. *Id.* at 56-57, 103, 126-53. Even on the university council, teachers are not only represented but are customarily deferred to by the lay members. *Id.* at 36-38.)

*Denmark:* Pedersen, *State and University—from Coexistence to Collision* in *UNIVERSITIES*, *supra* note 10, at 233, 252.

*Finland:* Pesonen, *The One Man-One Vote Issue* in *UNIVERSITIES*, *supra* note 10, at 365, 367-68.

*France:* H. COHEN, *ELUSIVE REFORM: THE FRENCH UNIVERSITIES*, 1968-78, at 55, 106-7, 163 (1978); Salmon, *The Loi d'Orientation and Its Aftermath*, in *UNIVERSITIES*, *supra* note 10, at 63, 73-74; Carreau, *Toward "Student Power" in France?*, 17 *AM. J. COMP. L.* 359, 361, 366 (1969). To an unusual extent, French universities are ministry controlled. COHEN, *supra*, at 163-71; Bourricard, *The Prelude to the Loi d'Orientation of 1968*, in *UNIVERSITIES*, *supra* note 10, at 31, 31-32.

*Germany:* Geck, *Student Power in West Germany*, 17 *AM. J. COMP. L.* 337, 343 (1969); Hennis, *Legislators and the Universities* in *UNIVERSITIES*, *supra* note 10, at 1, 18.

*Italy:* B. CLARK, *ACADEMIC POWER IN ITALY* 66-67 (1977); Mancini, *Student Power in Italy*, 17 *AM. J. COMP. L.* 371, 375 (1969).

*The Netherlands:* Daalder, *Universities Between the "New Democracy" and the "New Management"* in *UNIVERSITIES*, *supra* note 10, at 173, 175

*Norway:* Midgaard, *The Interplay of Local and Central Decisions* in *UNIVERSITIES*, *supra* note 10, at 275, 289; Selvig & Hambro, *Student Representation in Norwegian University Government*, 18 *AM. J. COMP. L.* 169, 169 (1970).

*Sweden:* Ruin, *External Control and Internal Participation—Trends in Swedish Higher Education*, in *UNIVERSITIES*, *supra* note 10, at 329, 338, 340.

*Yugoslavia:* Jovanovic, *Participation of Students in Administration of Colleges and Universities in Yugoslavia*, 18 *AM. J. COMP. L.* 172, 175 (1970).

18. In Britain, a university corporation consists, by law, of its "officers, faculty, administration, and students[, who], . . . in effect, are the 'owners' of the institution. In America, . . . the opposite is true. The trustees form the corporation, and the members of the administration and faculty, legally, are their 'employees.'" Hartnett, *Trustee Power in America*, in *POWER AND AUTHORITY: TRANSFORMATION OF CAMPUS GOVERNANCE* 25, 31 (H. Hodgkinson & L. Meeth ed. 1971). "Most of the business conducted at [council] meetings is dominated by members of the faculty," and "much of what the British [councils] decide must meet the approval of the faculty senate." *Id.* at 32.

The European tradition of autonomous and entirely self-governing universities is an ancient one which has been associated with intellectual freedom since the middle ages. HOFSTADTER & METZGER, *supra* note 14, at 6. Except in France, outsiders and non-scholars do not have much authority over the ongoing operation of a Western European university. In some countries, some lay people sit on a university's governing body, but (except in Britain) they are minority members—and their purpose is not to govern but to voice the interests of society as a whole. Each country's ministry of education has some authority to supervise universities, but (except in France) ministries tend not to assert on a regular basis the powers routinely exercised by an American board of trustees or regents and its appointed administrators. See Shils, *Great Britain and the United States: Legislators, Bureaucrats and the Universities*, in *UNIVERSITIES*, *supra* note 10, at 437; Daalder, *The*

ing the legal authority to appoint and discharge rectors still resided exclusively with the government. But the government was now dominated by Civic Forum, and it quickly dismissed all the rectors and deans in the country. The methods of selecting successors were not uniform from university to university, but elections, with student participation, were held in many institutions of higher learning. Regardless of the method of election, the first new rectors were formally invested on January 19 by Vaclav Havel, who had become president of the country in December.

At each university, an academic senate was established, and subordinate senates were established in colleges and schools within the university. Although all these senates exercise the kind of authority that in an American law school would be exercised only by the faculty and by the board of trustees or regents, they were in 1990 composed 45 per cent of teachers, 45 per cent of students, and 10 per cent of support staff.<sup>19</sup>

In announcing the appointments of new rectors, Havel stated that education was one of the aspects of Czechoslovak life that suffered the deepest damage under the regime, in part because those teachers with the most integrity and the best command of their fields had so often been dismissed. Civic Forum intended to remake university life, perhaps more quickly and more thoroughly than any other aspect of Czechoslovak society. The new rectors began by replacing deans, and the new deans were not always chosen by appointment.

In Prague, the law school is in the old town, next to the river and two blocks from the oldest synagogue still standing in Europe. After the departure of the prior dean, the issue became the method of selecting his

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*Sudden Revolution and the Sluggish Aftermath: a Retrospect since 1968*, in *UNIVERSITIES*, *supra* note 10, at 489.

19. Many Western European universities also include a large bloc of voting students on governing bodies—in some cases up to one-third of the voting members—although at most institutions students do not vote on academic appointments. In some western European countries, support staff also elect voting members of these bodies. See the following:

*Denmark*: Pedersen, *supra* note 17, at 253.

*Belgium*: Verhoeven, *supra* note 17, at 153, 159-60.

*Finland*: Pesonen, *supra* note 17, at 390.

*France*: COHEN, *supra* note 17, at 94-99; Carreau, *supra* note 17, at 365-69.

*Germany*: Hennis, *supra* note 17, at 19-20.

*The Netherlands*: Daalder, *supra* note 17, at 174.

*Norway*: Midgaard, *supra* note 17, at 288-89; Selvig & Hambro, *supra* note 17, at 169-71.

*Sweden*: Ruin, *supra* note 17, at 340, 351.

The high proportion of students in the Czechoslovak senates is unusual but not unique. The 1968 university reforms in France provided students with a similarly large number of seats in university governing bodies, Carreau, *supra* note 17, at 365-69; Bourricard, *supra* note 17, at 32, although when the reforms took effect, the "student members rapidly discovered how tedious it is to attend meetings and by the middle of the academic year most of them ceased to attend." Salmon, *supra* note 17, at 80.

Parity between teachers and students is not likely to last in Czechoslovakia. The Czechoslovak rectors have recommended that student membership be reduced to 33 per cent, and in future years the proportion may shrink further as the aura now surrounding students from the November uprising dissipates. This fits the pattern of 1968 and its aftereffects in Western Europe.

successor. In so many of these events over that hectic winter, a higher official—in this case, the new rector—had the authority to make appointments but nevertheless accepted reasonable selections made by the institution involved, which were often arrived at through elections. In the case of the law school, the new dean and the new vice dean were elected<sup>20</sup> in a procedure—probably never to be repeated—in which students were able to outvote the largest bloc of teachers. No higher authority required such an electoral formula. It just happened that way in the euphoria and exuberance of liberation and in the temporary inability of Party-member teachers to resist student demands.

Although new rectors and deans had been chosen and new curricula devised, there still were, throughout each university, a great many teachers—in many departments, a majority of teachers—whose competence was open to question. The solution might strike us as a violation of academic freedom, but in the end the Czechoslovak government had no choice. By statute enacted during the spring, academic senates were given the power to declare teaching posts vacant, and if teachers wished to be appointed—essentially to their own jobs—they had to apply and be evaluated,<sup>21</sup> regardless of seniority or prior expectations of job security. In some schools, all teachers were displaced as a group and compelled to apply for their own jobs. In others, the academic senate declared individual positions vacant if the professional and moral integrity of the teachers involved was suspect. This amounted to a revolution made at the same time from above (by the government and by new university administrators) and from below (by students).

Moral integrity had to be a subject for evaluation, at the very least because a number of teachers appeared to have informed in the past on colleagues and students for the secret police. Greater difficulty came with less offensive conduct—such as lying for the regime's convenience—that even people in the grey area may have felt compelled to do at one time or another to protect their livelihoods and their families.<sup>22</sup> In all likelihood, however, the universities will be able to remove only the most indisputably unfit teachers, who would be discharged anyway under any reasonable set of procedures. It is impossible to dismiss every compro-

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20. Deans are elected also in Denmark, Pedersen, *supra* note 17, at 253; Germany, Geck, *supra* note 17, at 342; Italy, CLARK, *supra* note 17, at 68-69, and Mancini, *supra* note 17, at 375; and Norway, Midgaard, *supra* note 17, at 289.

21. Thus, entire universities have gone through the anger, insecurity, and recrimination that some American law school clinics experienced when their law schools abolished old clinical positions and created new ones after the adoption of Standard 405(e) of the ABA Standards for Approval of Law Schools.

22. Before November, when a person implied that he or she might not do something the regime wanted done, the routine response was the threatened loss of a job or a spouse's job or a child's chances to attend a university, or the threatened denial of permission to build a cottage in the countryside or to take a vacation in a fraternal socialist country—all of which continually put people to choices between matters of principle and the welfare of themselves and the people they loved.

mised teacher: there are so many of them that the country simply does not have enough qualified replacements.

For a great many teachers, the idea of a career had become inverted. Before November, skill at academic gamesmanship was the primary determinant of success.<sup>23</sup> Then, suddenly, the measure of a teacher's worth shifted in part to things that are the very opposite of gamesmanship, such as loyalty to strongly held moral beliefs and the courage to act on them when the test came in November. And many compromised teachers began backpedalling furiously: the kind of personality that eagerly adapted to the regime tried just as eagerly to adapt to its successor, provoking in every instance the equivalent of Khrushchev's "When-were-you-right?" question. The compromised teacher, for example, who suddenly develops an interest in lecturing about previously banned authors provokes much the same reaction that Molotov, Malenkov, and Kaganovich did at a meeting of the Soviet Party Presidium in 1957 when they voted for the rehabilitation of generals in whose executions they had concurred during the purges twenty years before. "[D]uring the discussion, Nikita Sergeyevich asked them very quietly but directly: 'When were you right, then? At the time when you voted on their fate with such a tragic result, or today when you claim to rehabilitate them? Answer me, on which occasion were you right?' This plain, straightforward question infuriated . . . them."<sup>24</sup>

What kind of people are the compromised? Actually, they are quite bland and can hardly be picked out of a crowd. They did whatever they saw other people doing to make their way in the world. We know them here, too: people who adopt whatever persona is wanted by the organization for which they work, who cultivate personal connections instead of merit, who easily come to terms with the corrupt political culture that prevails in certain American cities and counties. Those in Czechoslovakia merely fastened their careers to a set of arrangements that was doomed.

#### IV. RESISTANCE: LAWYERS AND WRITERS

It may have been natural for the intelligentsia<sup>25</sup> to assume the leader-

23. In much smaller ways, the same problem occurs in the United States in what David Riesman has called the "still-adolescent" mentality that is "adept [at] academic intrigue," Riesman, *Introduction* to T. VEBLEN, *THE HIGHER LEARNING IN AMERICA* xvi (1954 ed.)—for example, in the occasional untenured American teacher who is eager to write on favored topics, say favored things at faculty meetings, and avoid association with problematic intellectual movements. The very idea of a career may be antithetical to the principles of a scholarly community.

24. Speech by Y. Furtseva, Verbatim Records of the XXIIInd Party Congress, *quoted in* M. TATU, *POWER IN THE KREMLIN, FROM KHRUSHCHEV TO KOSYGIN* 143-44 (1969).

25. Although we tend to use the words *intelligentsia* and *intellectuals* interchangeably, they have quite different meanings. "Intellectuals," Isaiah Berlin has written, "are persons who . . . simply want ideas to be as *interesting* as possible." Berlin, *The State of Europe: Christmas Eve, 1989*, 30 GRANTA 148, 148 (1990) (emphasis added). It is enough that one enjoys ideas for their own sake. In people of maturity and talent, that quality can produce valuable insights, artistic accomplishment,

ship of this uprising,<sup>26</sup> but why was the intelligentsia itself led most prominently by writers<sup>27</sup> to the near exclusion of lawyers? And, before 1968 when they fought First Secretary Novotny<sup>28</sup>, why did writers—primarily banned writers<sup>29</sup>—acquire reputations for moral integrity that Czechoslovak lawyers<sup>30</sup> did not?

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or both. Without maturity, it can lead to self-marginalization, as in the self-absorption and self-pity of the “alienated” intellectual. The original intelligentsia was, however, something quite different:

[a] nineteenth century . . . movement of educated, morally sensitive Russians stirred to indignation by an obscurantist Church; by a brutally oppressive [Czarist] state indifferent to the squalor, poverty and illiteracy in which the great majority of the population lived; by a governing class which they saw as trampling on human rights and impeding moral and intellectual progress. . . .

The intelligentsia, for the most part, consisted of members of the professions. The best known were the writers—all the great names (even Dostoyevsky in his younger days) were in various degrees and fashions engaged in the fight for freedom. It was the descendants of these people who were largely responsible for making the February Revolution of 1917. Some of its members who believed in extreme measures took part in the suppression of this revolution and the establishment of Soviet communism in Russia, and later elsewhere. In due course the intelligentsia was . . . systematically destroyed [by the Stalinist apparatus], but it did not wholly perish.

*Id.* at 149. *Accord* THE RUSSIAN INTELLIGENTSIA (R. Pipes, ed. 1961). As it did with so much else in language, the apparatus corrupted the term so that “the intelligentsia” came to include every person whose job required a higher education—a category that in any society can encompass a substantial number of conformists and careerists. *See also* N. MANDELSTAM, *HOPE AGAINST HOPE* 230-32, 331-33 (1980) and THE RUSSIAN INTELLIGENTSIA, *supra*.

26. The intelligentsia had been making trouble for the regime for over a quarter of a century. *See* V. KUSIN, *THE INTELLECTUAL ORIGINS OF THE PRAGUE SPRING* (1971) (the Prague Spring was the result of a decade of groundwork by the intelligentsia); H. SKILLING, *CHARTER 77 AND HUMAN RIGHTS IN CZECHOSLOVAKIA* (1981) (Charter 77 organized by the intelligentsia).

27. In addition “to the traditionally high role conceded by [Czechoslovak] public opinion to the artist and thinker,” writers were the leading opposition in the 1960’s. A. FRENCH, *CZECH WRITERS AND POLITICS*, 1945-1969, at 386-87 (1982). *See also* FRENCH, *supra*, at 250-71, 392; D. HANSIK, *WRITERS AGAINST RULERS* (1971); HAVEL, *DISTURBING THE PEACE*, *supra* note 7, at 84-85; Vaculik, *Two Thousand Words to Workers, Farmers, Scientists, Artists, and Everyone in CZECHOSLOVAKIA: THE PARTY AND THE PEOPLE* 261-68 (A. Oxley, A. Pravda & A. Ritchie ed. 1973); K. DAWISHA, *THE KREMLIN AND THE PRAGUE SPRING* 165-77, 184, 310, 354 (1984).

28. First Secretary of the Czechoslovak Communist Party (replaced by Dubcek, January 1968) and President of the Czechoslovak Socialist Republic (replaced by Svoboda, March 1968): notorious, among other things, for declaring that he would not be “bullied by facts,” a line that the young Havel actually succeeded in putting into an anti-bureaucratic play produced while Novotny was still in power. *See* V. HAVEL, *THE MEMORANDUM* 62 (V. Blackwell transl. 1967), and Webb, *Introduction to HANSIK*, *supra* note 27, at 12.

29. The work of banned writers was widely circulated in samizdat, creating a “typewriter culture.” H. SKILLING, *SAMIZDAT AND AN INDEPENDENT SOCIETY IN CENTRAL AND EASTERN EUROPE* 26 (1989). During normalization,

Czechoslovakia [came] to have two literatures: one, an official literature, printed with official blessing by real publishing houses paying authors royalties, but read by virtually nobody; and a second, shadow literature, disseminated in typewritten copies, sometimes bound by hand, and sold through personal contact for a price covering the cost of production. This shadow literature [was] read eagerly and passed from hand to hand.

Liehm, *Foreword to THE WRITING ON THE WALL* v, ix (A. Liehm & P. Kussi ed. 1983).

30. The Czechoslovak legal profession is divided into several hundred “advocates” (who work in “legal advice bureaus”) and many thousands of house counsel (who are employed in the legal departments of hitherto state-owned enterprises). The “advocates” were the only lawyers who could be retained by the public, and only they are discussed here. (Both parts of the legal profession are now being privatized. The legal advice bureaus are being reorganized into law firms.) As enterprises are being converted into entities expected to compete for profit, the legal departments of at least some will make themselves available for outside work. For a description of Soviet house counsel, *see* L. SHELLEY, *LAWYERS IN SOVIET WORK LIFE* (1984).

Before the uprising, the bar association was, by statute, authorized to relieve an advocate "of his duty to respect [a client's confidences] . . . if an important state interest requires that the advocate disclose the relevant facts to a court [or a state] agency."<sup>31</sup> In practice, this meant, of course, that whenever the regime wanted to know what a client had said to his or her lawyer, it quickly found out. There were also other means through which the bar was neutralized. Advocates were obligated by statute to "guide individuals [including clients] toward fulfillment of their obligations to the State and society, towards respect for the law and their fellow-citizens, and [to] thereby [further] socialist legal consciousness."<sup>32</sup> Violations of this duty could and did lead to disbarment.

For example, when some jazz musicians applied for official permission in 1971 to set up the organization that eventually became the Jazz Section of the Czech Musicians' Union, bureaucratic carelessness enabled them to escape censorship and government appointment of their chairperson. The Section's publications became outlets for nonconformist views and quickly gained large circulations. It even published a banned novel and "probably the largest dictionary of rock music in the world."<sup>33</sup> The regime attempted to close down the Section administratively. When the officers of the Section tried to challenge that action in court, they were prosecuted, and their lawyer—who advised them to litigate the matter—was disbarred.<sup>34</sup>

In addition, advocates were required to work<sup>35</sup> in legal advice bureaus which were each headed by a person responsible, among other things, for "the ideological, political, and professional education" of the lawyers under his or her supervision.<sup>36</sup> Applicants for the bar were also screened for "full civic integrity," which meant that the authorities had to be satisfied that they were "dedicated to the socialist system"<sup>37</sup> or at least willing to conform.

During normalization, the Writer's Union voted "almost unanimously" to refuse to sign the loyalty oath that was required of everyone, and "[t]he regime reacted by dissolving the union, eliminating its remaining publications, and confiscating its property, including the publishing

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31. Act of 29 October 1975 Concerning the Bar, § 7(2). (The entire act is translated at 19 BULL. CZECHOSLOVAK L. 248 (1980).)

32. *Id.* at § 2(2).

33. H. SKILLING, SAMIZDAT, *supra* note 29, at 81.

34. See *Report on Czechoslovakia*, REV. INT'L COMM'N. OF JURISTS, NO. 38, at 2-3 (1987). See also SKILLING, SAMIZDAT, *supra* note 29, at 83. One of the few lawyers who tried to defend a Charter 77 activist was disbarred and imprisoned for "insulting a magistrate" and "insults to public officers." Errera, *Charter 77 in Czechoslovakia and the International Protection of Human Rights*, 13 VAND. J. TRANSNAT. L. 409, 424-25 (1980). Consequently, very few Czech or Slovak lawyers were willing to defend anyone in political trouble, and even fewer were willing to make *active* defenses. See *infra* note 55 and accompanying text.

35. Act Concerning the Bar, *supra* note 31, § 21(1).

36. *Id.* at § 21(2)(d).

37. *Id.* at § 29.

plant and offices.”<sup>38</sup> But the legal profession and the judiciary acquiesced in all the regime’s demands, and eventually the legal profession lost the trust of the public. Some lawyers were in the grey area,<sup>39</sup> but the impression became universal that if one were in political trouble, consulting a lawyer could not possibly help and—because the regime had ready access to client confidences—would probably make matters worse.<sup>40</sup> And the public assumed that every judge had been corrupted by the Party.<sup>41</sup> Throughout East Central Europe, when a judge was said to have received “a telephone call” about a pending case, everyone understood from whom the call had come and what its purpose was.<sup>42</sup>

American lawyers tend to assume that a legal profession is a bulwark against tyranny, but that may be more the exception than the rule. Rarely have lawyers formed the vanguard of resistance against a twentieth-century dictatorship.<sup>43</sup> And no legal profession has ever done what the Czechoslovak Writers’ Union did during normalization: refuse so flatly to surrender its integrity that a regime had to destroy it. Not only do dictatorships quickly find ways of sterilizing their legal professions, but even when democratic societies have descended into one-party states,

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38. Liehm, *supra* note 29, at viii. A few years later, the regime “organize[d] a new, ‘selective’ Union of Czechoslovak Writers,” the membership of which consisted of “a handful of old Stalinists and military officers . . . [and] people without talent who gladly set about preventing anyone more talented than themselves from coming to the fore.” *Id.* at ix.

39. A very, very few were more than that, among them Petr Pithart, who after the revolution became premier of the Czech republic (the western part of the country); Dagmar Buresova, who became minister of justice of the Czech republic and then chair of the Czech National Council; and Jan Carnogursky, who became deputy premier of the federal government and later premier of the Slovak republic.

40. Vaclav Havel recalls that after he was arrested in 1977 as a leader of the Charter 77 movement, “I was deceived by my interrogators and *even by my own defense lawyer.*” HAVEL, *DISTURBING THE PEACE*, *supra* note 7, at 66 (emphasis added). Some Polish lawyers behaved more courageously under martial law in the early 1980’s. A. SWIDLICKI, *POLITICAL TRIALS IN POLAND 1981-1986*, at 192-203 (1988). At least four defense lawyers were themselves imprisoned for arguing in court that the martial law decree was invalid, and disciplinary proceedings were instituted against at least two more lawyers for the same reason. *Id.* at 196, 198, 202-3. During the preceding years, the Polish regime apparently did less than its Czechoslovak counterpart to sterilize the bar—compare *id.* at 193 with KRYSTUFEK, *supra* note 5, at 79-102, 110-27—but the Polish regime quickly realized its mistake and enacted a new statute intended to tighten its control over the profession, Swidlicki, *supra* at 203-13. But even that was far less draconian than the earlier Czechoslovak efforts, perhaps because of the peculiar ambivalence exhibited by the Polish regime throughout the 1980’s. In addition, Solidarity’s influence may have so permeated Polish society that no profession could be immune to it.

41. See generally, ULC, *supra* note 12. “Faith in the justice of the courts is something quite foreign. . . .” SIMECKA, *supra* note 4, at 101. “It is quite impossible for a judge to be considered a moral hero in a country where thousands of people are convicted and subsequently rehabilitated as the victims of unjust trials.” *Id.* at 102.

42. See Frankowski, *The Procuracy and the Regular Courts as the Palladium of Individual Rights—The Case of Poland*, 61 *TULANE L. REV.* 1307, 1327-1335 (1987).

43. Gandhi considered the Hindu and Muslim bar in India to be tools of the British Raj. G. SHARP, *GANDHI AS A POLITICAL STRATEGIST* 48-49 (1979). Even though many lawyers were prominent in the independence movement, Gandhi thought they should all resign from the practice of law because the Raj “had always been able to retain [its] power through the instrumentality of lawyers.” M. GANDHI, *THE LAW AND LAWYERS* 126 (S. Kher ed. 1962). The British “always look[] to the lawyers, however fine fighters they may have been, to *preserve their dignity and their self-respect.*” *Id.* at 126-27 (emphasis added). See *infra* notes 92, 108-10 and accompanying text.



their legal professions have not, as groups, fought to preserve civic rights. Instead, in each instance lawyers were quick to adapt to what they saw as new "realities."

When the *rechtsstaat*—the German concept of government run by the detailed letter of the law—gave way to the *führerstaat*, the German bench and bar raised not the slightest complaint.<sup>44</sup> And when the Nazis disbarred Jewish lawyers en masse, the remainder of the bar could not contain its joy over the economic opportunities thereby created.<sup>45</sup>

No other professional group protested so feebly against Nazi injustice than . . . the judiciary. Only a few weeks after Hitler had [taken power in 1933] and abrogated the most important basic rights enshrined in the Constitution, and only a few days after the Nazis had terrorized their political opponents, the Confederation of German Judges declared 'its full trust in the Government.' Even the dismissal [from the bench] of their Jewish colleagues . . . was accepted without protest. . . . On the whole, judges were wont to interpret racially discriminatory laws even more extensively than the regime expected them to.<sup>46</sup>

Throughout the life of the Weimar Republic, the "anti-democratic beliefs of a majority of judges provided an unbroken transition to the Nazi regime."<sup>47</sup> And in the Reichstag Fire trial, Dimitrov had to represent himself because the lawyer assigned to defend him was so anxious not to offend the Nazis as to become completely ineffectual. Dimitrov cross-examined Goering and Goebbels—exposing them both as liars—and according to Hannah Arendt, "it was thanks to him that all those accused, except van der Lubbe, had to be acquitted."<sup>48</sup> Of the five

44. M. LINDER, THE SUPREME LABOR COURT IN NAZI GERMANY: A JURISPRUDENTIAL ANALYSIS 42-43 (1987); D. RUESCHEMEYER, LAWYERS AND THEIR SOCIETY: A COMPARATIVE STUDY OF THE LEGAL PROFESSION IN GERMANY AND IN THE UNITED STATES 181-82 (1973).

45. RUESCHEMEYER, *supra* note 44, at 181-82, 242 n. 97; F. MORSTEIN MARX, GOVERNMENT IN THE THIRD REICH 129 (1936); Fernandez, *The Law, Lawyers and Courts in Nazi Germany*, 1 S. AFR. J. HUMAN RTS. 124, 127-29 (1985); Reifner, *The Bar in the Third Reich: Anti-Semitism and the Decline of Liberal Advocacy*, 32 MCGILL L.J. 96 (1986). "[I]n 1933 one out of every five advocates in the German Reich and every other lawyer in Berlin was Jewish." Blankenburg & Schultz, *German Advocates: A Highly Regulated Profession* in 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 124, 147 (R. Abel & P. Lewis ed. 1988). Within two years, the Nazis had disbarred nearly half the Jewish advocates, and by 1938 there were no Jewish lawyers left in Germany. *Id.* at 129. The bar itself readily disciplined lawyers who were "inconvenient." Fernandez, *supra*, at 131-32. See also Richards, *Terror and the Law*, 5 HUMAN RTS. Q. 171 (1983) (participation by German lawyers in state terrorism).

46. Fernandez, *supra* note 45, at 129-30. Accord R. GRUNBERGER, A SOCIAL HISTORY OF THE THIRD REICH 22 (1971); H. KOCH, IN THE NAME OF THE VOLK: POLITICAL JUSTICE IN HITLER'S GERMANY 7 (1989) ("judges . . . continued their careers under the Third Reich with scarcely a murmur of protest").

47. Ehrmann, *Judicial Activism in a Divided Society: the Rule of Law in the Weimar Republic* in COMPARATIVE JUDICIAL SYSTEMS 75, 75 (J. Schmidhauser ed. 1987). Accord H. FERTIG, THE THIRD REICH 600-27 (1975); E. KOLB, THE WEIMAR REPUBLIC 36, 45 (P. Falla transl. 1988); A. NICHOLLS, WEIMAR AND THE RISE OF HITLER 46-48 (1968).

48. H. ARENDT, EICHMANN IN JERUSALEM 188 (2d ed. 1965). See F. TOBIAS, THE REICHSTAG FIRE 221-31 (1964).

defendants, only one (Torgler) was able to find an attorney who took the case seriously.<sup>49</sup>

The French judiciary—virtually without change of personnel except for routine retirements—faithfully enforced the law of the democratic Third Republic until June 1940, the law of the fascist Vichy regime from 1940 until 1944, and the law of the democratic Fourth Republic thereafter.<sup>50</sup> During the Vichy period, “[p]erhaps the most casuistic and excited debate in the French courts”<sup>51</sup>—pursued with meticulous precision—involved the burden of proving Jewishness under statutes enacted by the French to emulate the Nuremberg laws, with the result that, “[b]roadly speaking, the antisemites got what they wanted.”<sup>52</sup>

No Soviet lawyer is known to have attempted anything remotely like what Pasternak did in his campaign to save Mandelstam, with its frightening and “miraculous” telephone conversation with Stalin.<sup>53</sup> Instead, during the protracted period that began with the creation of the Cheka in December 1917 and culminated in the purge trials and hysteria of the 1930s, the Soviet bar seemed more concerned with its own professional prerogatives than with any obligation to defend civil liberties.<sup>54</sup> It was common in all the purge trials of the 1930s and 1950s for defense lawyers to compete with the prosecutor in condemning their own clients, confining advocacy—if it appeared at all—to minute issues of sentence.<sup>55</sup> Some defense lawyers, “anxious to illustrate their loyalty to the regime,” asked courts to impose “harsher penalties [on] their clients than [those] requested by the prosecutor.”<sup>56</sup> Vyshinsky told them to stop on the ground that the true function of a Soviet defense lawyer was to produce just enough advocacy to create the *impression* of procedural justice—not more and not less.<sup>57</sup> (Those who produced more advocacy were professionally disciplined.<sup>58</sup>)

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49. See TOBIAS, *supra* note 48, *passim*. Compare the conduct of the writer Carol von Ossietzky, who was convicted of “literary treason” after he wrote a series of articles which exposed the Nazis and the interest groups that were collaborating with them — as a result of which he was awarded the 1935 Nobel Peace Prize while incarcerated in a prison camp. See FERTIG, *supra* note 47, 608 (1975); THE STOLEN REPUBLIC: SELECTED WRITINGS OF CARL VON OSSIETSKY (B. Frei ed. 1971).

50. R. PAXTON, VICHY FRANCE 339-40 (1972).

51. Weisberg, *Avoiding Central Realities: Narrative Terror and the Failure of French Culture under the Occupation*, 5 HUMAN. RTS. Q. 151, 163 (1983).

52. M. MARRUS & R. PAXTON, VICHY FRANCE AND THE JEWS 144 (1981). Compare Zola, *J'Accuse*, L'AUREOLE, Jan. 13, 1898, with the judicial record reproduced in L. SNYDER, THE DREYFUS CASE: A DOCUMENTARY HISTORY (1973).

53. See Mandelstam, *supra* note 25, at 145-47. For the context in which this occurred, see R. CONQUEST, THE GREAT TERROR (3d ed. 1990), and R. MEDVEDEV, LET HISTORY JUDGE (2d ed. 1989).

54. See E. HUSKEY, RUSSIAN LAWYERS AND THE SOVIET STATE (1986).

55. See, e.g., M. COTIC, THE PRAGUE TRIAL 127-30 (1987); K. KAPLAN, REPORT ON THE MURDER OF THE GENERAL SECRETARY 231 (1990).

56. HUSKEY, *supra* note 54, at 212.

57. *Id.* at 212.

58. *Id.* at 212-13. Eventually, to preclude such problems, these evolved into “show” trials in which all the participants—lawyers, judges, witnesses, even the defendants themselves—learned

Although there is a long and surviving tradition of human rights advocacy in the South African bar<sup>59</sup> (at times involving some of the leading advocates in the country), the South African legal profession as a whole has historically taken a "neutral attitude" toward apartheid.<sup>60</sup> And although a small but growing part of the South African bar appears willing to challenge apartheid<sup>61</sup> and a similar part of the bench appears willing to sustain such challenges,<sup>62</sup> South African lawyers for the most part have supported the status quo.<sup>63</sup>

"In the nineteen fifties and nineteen sixties . . . very little protest was heard from either the practising or legal academic profession. . . . Scholastic writing . . . on the race laws [was limited] to formalistic [and] technical [explanations] designed more to clarify the statute than to evaluate its social, economic and political effects."<sup>64</sup>

Moreover, the increased activism in recent years among South African lawyers and judges may be part of a larger ambivalence that white South African society as a whole has begun to feel about apartheid, an ambivalence which has led the South African regime itself to start dismantling some of the structures of repression.<sup>65</sup>

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their parts by heart from pre-written scripts which had been approved in "the highest places." Deviation from a script was brutally punished. See KAPLAN, *supra* note 55, at 196-236.

59. In a forthcoming book, Stephen Ellmann will explore the role of the South African legal system and legal profession in restraining government power during the state of emergency in the 1980's.

60. Fernandez, *supra* note 45, at 136. See also Dugard, *The Judiciary in a State of National Crisis—With Special Reference to the South African Experience*, 44 WASH. & LEE L. REV. 477, 486 (1987) (judicial indifference to torture by the security police as well as other abuses).

61. J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 243-44 (1978) (a "high standard of legal assistance [has been] rendered in political trials," *id.* at 247); J. JACKSON, JUSTICE IN SOUTH AFRICA (1980); Cooper, *Public Interest Law—South African Style*, 11 COLUM. HUM. RTS. L. REV. 105 (1979-80); Christenson & Deffenbaugh, *The SWAPO trial: a Partisan Trial in CHRISTENSON, POLITICAL TRIALS* 35 (1986); Fernandez, *supra* note 45, at 136; White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699.

62. DUGARD, HUMAN RIGHTS, *supra* note 61, at 279-88; Dugard, *The Judiciary*, *supra* note 60, at 486, 488, 492-94; C. FORSYTH, IN DANGER FOR THEIR TALENTS: A STUDY OF THE APPELLATE DIVISION OF THE SUPREME COURT OF SOUTH AFRICA FROM 1950-80 (1985); Basson, *Judicial Activism in a State of Emergency: An Examination of Recent Decisions of the South African Courts*, 3 S. AFR. J. HUMAN RTS. 28 (1987); Christenson & Deffenbaugh, *supra* note 61, at 66-69; Cowling, *Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premise*, 3 S. AFR. J. HUMAN RTS. 177 (1987); Mureinik, *Pursuing Principle: The Appellate Division and Review under the State of Emergency*, 5 S. AFR. J. HUMAN RTS. 60 (1989); Comment, *What Role Can South African Judges Play in Mitigating Apartheid? A Study of the Urban African Legal Regime*, 1987 WIS. L. REV. 325.

63. DUGARD, HUMAN RIGHTS, *supra* note 61, at 288-365; FORSYTH, *supra* note 62; Cameron, *Nude Monarchy: The Case of South Africa's Judges*, 3 S. AFR. J. HUMAN RTS. 338 (1987); Haysom & Plasket, *The War Against Law: Judicial Activism and the Appellate Division*, 4 S. AFR. J. HUMAN RTS. 303 (1988); Marcus, *Respect for the Courts: Myth and Reality*, 1 S. AFR. J. HUMAN RTS. 236 (1985); Mathews, *The South African Judiciary and the Security System*, 1 S. AFR. J. HUMAN RTS. 199 (1985); Mureinik, *supra* note 62. The organized bar has failed to protest harassment of activist lawyers by the government and has at times harassed them itself. DUGARD, *supra* note 61, at 244; JACKSON, *supra* note 61, at 208-17.

64. Fernandez, *supra* note 45, at 135.

65. In some ways, the South African legal profession lags behind the regime. As late as February 1991—long after the government had begun a gradual breakdown of apartheid—two white

Formalism and legal positivism are the usual adaptive responses of lawyers and law teachers who live under dictatorial regimes.<sup>66</sup> In Czechoslovakia, not only were lawyers and law teachers part of the machinery of oppression, but lay people described the regime's legal system in exactly the same rhetoric used by the Critical Legal Studies movement to describe American law. Havel, for example, wrote the following in 1978:

[T]he legal code functions as an excuse. It wraps the base exercise of power in the noble apparel of the letter of the law; it creates the pleasing illusion that justice is done, society protected and the exercise of power objectively regulated. All this is done to conceal . . . the total manipulation of society. If an outside observer who knew nothing at all about life in Czechoslovakia were to study only its laws, . . . [the] political manipulation of the courts . . . would remain hidden. . . . [T]he legal code . . . is not more than a façade, an aspect of the world of appearances . . . [and] an essential instrument of ritual communication. . . . It is the legal code that enables all components of the system . . . to put themselves in a good light, to establish . . . legitimacy.<sup>67</sup>

As a general proposition, significant numbers of lawyers are willing to fight to increase rights and liberties only in societies that are already free in a number of fundamental ways and are likely to remain so. And even in those societies, it is only a minority of lawyers—usually outsiders to the established legal culture—who will take on such struggles. A lawyer who specializes in fighting for civil rights or civil liberties has chosen a deviant professional path—sometimes honored for its integrity and charm, but deviant nonetheless—and a “normal” lawyer who takes on an isolated civil rights or liberties case is considered to have committed an act of deviance understandable only as a *beau geste*. Sometimes, the established bar is quite hostile to these efforts.<sup>68</sup> When lawyers in noticeable numbers become involved in struggles to promote freedom, that alone can usually be taken as evidence that a society already has enough civic health to risk improving itself through its existing governmental structures—a process in which lawyers are the mere instruments of energies far larger than themselves. But when a society's entire system of liberty is attacked or has already been overcome (or aborted) by powerful

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men could be fined as little as \$200 and \$80, respectively, after killing a black man by boiling him alive in an industrial steam cleaning machine. N.Y. Times, Feb. 18, 1991, at 2, col. 3. Similar sentences in other cases were imposed in the preceding two or three years. *Id.*

66. See Richards, *supra* note 45; Dugard, *The Judiciary*, *supra* note 60, at 496-98.

67. HAVEL, *THE POWER OF THE POWERLESS*, *supra* note 8, at 23, 73-75.

68. See, e.g., J. AUERBACH, *UNEQUAL JUSTICE* 232-59 (1976) (participation of the established bar in civil liberties violations during the hysteria of the McCarthy era); J. BASS, *UNLIKELY HEROES* 289-96 (1981) (southern bar's refusal to represent civil rights plaintiffs in the 1960's and its eagerness to ostracize lawyers who did).

forces, lawyers almost never do more than other groups to promote democracy—and very often they do substantially less.

This is a twentieth century phenomenon of the developed countries,<sup>69</sup> for lawyers “were prominent . . . in the bourgeois revolutions of the seventeenth and eighteenth centuries,”<sup>70</sup> principally the French and our own.<sup>71</sup> Edmund Burke is often quoted as blaming some portion of the French Revolution on the “habitually meddling, daring, subtle, active . . . litigious dispositions and unquiet minds” of lawyers.<sup>72</sup> But that is a quote out of context, both textually and historically, the latter more significant than the former.

Burke made it clear that he was speaking not of all lawyers, but only of mediocre ones—the “mechanical part” of the profession<sup>73</sup>—and that he was complaining in particular of a group of lawyers who formed “a very great proportion” of the the third estate in the States-General, which

was composed, not of distinguished magistrates, . . . not of leading advocates, . . . not of renowned professors in universities,—but for the far greater part . . . of the inferior, unlearned, mechanical, merely instrumental members of the profession. . . . From the moment I read the list, I saw distinctly, and very nearly as it has happened, all that was to follow.<sup>74</sup>

Burke supposed that this group of lawyers persuaded their co-legislators to unravel the institutions of organized society because to do so “would lay open to them those innumerable lucrative jobs which follow in the train of all great convulsions . . . and particularly in all great and violent permutations of property,”<sup>75</sup>—as though the French Revolution began in part as a kind of *Avocats’ and Notaires’ Relief Act of 1789*. So extravagant a theory may have resulted from the application of imagination and excitement to more basic and verifiable facts.

To the extent that the French bar as a whole resisted the monarchy

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69. In the last two decades, some lawyers and judges in some underdeveloped countries have formed an important part of the intelligentsia (in the classical sense of the word), often at great personal risk. In Argentina in the 1970’s and in Guatemala in the 1980’s, for example, a number of lawyers who represented dissidents were murdered by powerful political forces. Klitzman, *International Protection of the Independence of the Judicial Process: Defending Lawyers, Judges, and the Rule of Law*, 31 FED. BAR NEWS & J. 219, 219-220 (1984). See also F. ZIADEH, *LAWYERS, THE RULE OF LAW, AND LIBERALISM IN MODERN EGYPT* (1968); *In Defense of Rights: Attacks on Lawyers and Judges in 1989*, LAWYERS COMM. FOR HUM. RTS. (1990); N.Y. Times, Mar. 10, 1991, § 4, at 2, col. 4 (Kenya).

70. Perdomo, *The Venezuelan Legal Profession: Lawyers in an Inegalitarian Society* in 2 LAWYERS IN SOCIETY, *supra* note 45, at 380, 394.

71. Although Jefferson, John Adams, Patrick Henry, and a number of other revolutionists were lawyers, the colonial bar was more divided than one might assume. The revolution “precipitated the departure of many lawyers with Tory sympathies, including some of the most prominent practitioners.” R. ABEL, *AMERICAN LAWYERS* 40 (1989).

72. Burke, *Reflections on the Revolution in France* in 3 E. BURKE, *WORKS* 231, 287 (1899) (orig. ed. 1790).

73. *Id.* at 287.

74. *Id.* at 286.

75. *Id.* at 287.

while the latter was in power, it was only for the purpose of securing and defending the professional privileges that were subsequently abolished in 1789.<sup>76</sup> This was part of the jostling for spoils that interest groups engage in in any society, and there was no hint of a design to bring down the regime. When the revolution did come, it “persuaded large numbers of advocates to abandon their professional loyalties and obligations in the service of higher ideals” and to advocate the abolition of their own prerogatives.<sup>77</sup> This did not last long, however, and the French bar expended enormous effort over the following several decades trying to regain the privileges lost in the revolution.<sup>78</sup>

Tocqueville wrote that “[i]n England, [lawyers] have contracted a close alliance with the aristocracy; [but] in France they have shown themselves its most dangerous enemies.”<sup>79</sup> The cause in both cases may have been the same: a robust guild, aspiring to privilege and everywhere “very hostile to the revolutionary spirit,”<sup>80</sup> may have been co-opted in one country and ignored, at the aristocracy’s peril, in the other.<sup>81</sup> Tocqueville thought that in America lawyers had found a void and filled it by *becoming* an aristocracy.<sup>82</sup> Once the era of bourgeois revolutions was over, the bar’s task in every developed country became to protect what it had obtained, even at the cost of accommodating itself to new regimes of more complete power than previously feasible.

Why are lawyers so much less effective than some writers<sup>83</sup> in such

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76. Burrage, *Revolution as a Starting Point for the Comparative Analyses of the French, American, and English Legal Professions* in 3 *LAWYERS IN SOCIETY: COMPARATIVE THEORIES* 322, 327-29 (R. Abel & P. Lewis ed. 1989). “Status seems to have been the major collective preoccupation of advocates under the ancien régime, subordinating all other goals.” *Id.* at 328. “A privileged body can never satisfy the ambitions of all its members . . . , so that a considerable number of individuals are usually to be met with who are inclined to attack [whatever] privileges they cannot soon enough turn to their own account.” 1 A. TOCQUEVILLE, *DEMOCRACY IN AMERICA* 274 (P. Bradley ed. 1966).

77. Burrage, *supra* note 76, at 329. “It is true that lawyers mainly contributed to the overthrow of the French monarchy in 1789; but it remains to be seen whether they acted thus because they had studied the laws or because they were prohibited from making them.” TOCQUEVILLE, *supra* note 76, at 274.

78. *Id.* at 330-31. Soon after Waterloo, the Paris bar “petitioned Louis XVIIIth for restoration of their ancient rights, arguing that there was a natural affinity between the monarchy and professional [i.e., the bar’s] self-government.” *Id.* at 331. When the monarchy did not see things that way, the old struggle began all over again, and the bar “took a leading part in the movement to overthrow the regime,” which succeeded in 1830. *Id.* Resistance among the bar to successive monarchical and imperial regimes continued, *Id.* at 331-32—apparently from mixed motives of idealism and the defense of status—until the politics of the early years of the Third Republic, in the last quarter of the nineteenth century, were dominated by lawyers after what was seen to be a “tradition of opposition to authoritarianism.” Boigeol, *The French Bar: The Difficulties of Unifying a Divided Profession* in *LAWYERS IN SOCIETY*, VOL. 2, *supra* note 45, at 258, 269. In the twentieth century, lawyers became much less prominent in French politics. *Id.*

79. TOCQUEVILLE, *supra* note 76, at 273.

80. *Id.*

81. “When an aristocracy excludes the leaders of [the legal] profession from its ranks, it excites enemies. . . . But whenever an aristocracy consents to impart some of its privileges to these same individuals, the two classes coalesce. . . .” *Id.* at 274-75.

82. *Id.* at 272-80.

83. The Soviet Writers’ Union and its post-normalization Czechoslovak counterpart—and the

extreme situations? Perhaps most importantly, a lawyer is vulnerable because a life's work in the law is structured and thought of as a career which needs to be nurtured and protected—so much so that when threatened by dictatorship, a lawyer's first concern becomes how to sustain that career by whatever means necessary. But a writer is a mere conduit through which a voice speaks, and nothing is more important to a writer than letting that voice describe whatever is worth commenting on—even if the consequences might profoundly damage people the writer loves.<sup>84</sup> In situations where a lawyer is simply too intimidated to act, a writer might not be able to stop himself or herself from speaking as the conscience of a people.

Although books achieve extraordinarily wide readerships in Czechoslovakia—and did so even when good writing had to be distributed in samizdat—“before being accepted, [a] book has to convey truth and honesty because the sophisticated Czech reader will not tolerate pretense. . . . [Although] in our society writers can earn a decent living with their writing, . . . what is more important is *moral prestige* even if it is rewarded by a prison term.”<sup>85</sup> According to the Czech novelist Ivan Klima, the experience of oppression frees a writer from the corrupting interest in producing books that will sell, providing instead clarity of vision, intellectual integrity, a bond of solidarity with those similarly afflicted, and complete concentration on the most meaningful of themes.<sup>86</sup> “Dissidence is said to be an oddly liberating experience. Czech dissidents claim that, once taken, the decision to stop dissembling, to risk everything, to be exactly who and what they were, made life simple for them.”<sup>87</sup>

A lawyer, on the other hand, instinctively learns to work within a system, even a corrupt or tyrannical one. A lawyer is a manipulator of whatever structure of power he or she happens to be confronted with. To make a life's work out of manipulating a structure of power is to come to

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literary establishments of other countries, too, both east and west—have included ample numbers of opportunists capable of behaving unspeakably in order to promote their own interests. See, e.g., HAVEL, *DISTURBING THE PEACE*, *supra* note 7, at 92 (some Czechoslovak writers “produc[ed] articles that . . . helped create a climate for mass approval” of the purge trials of the 1950's); V. VOINOVICH, *THE IVANKIAD* (1976) (lavish living conditions of favored writers in the Soviet writers' union).

84. As he got older, William Faulkner found that he had to be drunk to write at his best. He went through cycles of bored sobriety and inspired intoxication. His daughter Jill feared the latter, and she could recognize signs of each approaching binge. Once—when she was about 12 years old and had missed her father deeply because he had lived part of the preceding years elsewhere to write film scripts—she realized that he was about to go on a roaring drunk that might last for weeks, and she begged him not to. He brushed her aside with words she never forgot: “Nobody remembers Shakespeare's children.” 2 J. BLOTNER, *FAULKNER* 1204 (1974).

85. K. Pecka, *Literature is Not a Matter of Course*, paper delivered at the NYU Conf. on Czech Lit. & Culture, Mar. 21, 1990, at 2 (emphasis added).

86. Klima, *The Unexpected Merits of Oppression*, paper delivered at the NYU Conf. on Czech Lit. & Culture, Mar. 17, 1990. “The more I was deprived of things which I used to enjoy—e.g. editorial meetings, lectures, applause, prizes, and public recognition—the freer I felt.” Klima, *quoted in* H. SKILLING, *SAMIZDAT*, *supra* note 29, at 76-77.

87. Kramer, *Letter from Europe*, *The New Yorker*, Mar. 12, 1990, at 74.

terms with it, to avoid issues that cannot be fit into its routine methods of decision-making, to devalue or reject clients whose causes would inhibit the lawyer's access to it, and ultimately to become a part of it.

And as a life's work, writing may simply be more attractive than lawyering to people whose personalities are so "unreasonable" as to make them well suited to undermining a regime. John Gardner listed the following among qualities commonly found among novelists:

"obstinacy and a tendency toward churlishness (a refusal to believe what all sensible people know is true); . . . an apparent lack of . . . serious life purpose [in other words, insufficient ambition]; . . . a lack of proper respect; mischievousness . . . ; a strange mixture of shameless playfulness and embarrassing earnestness . . . ; patience like a cat's; a criminal streak of cunning; . . . and improvidence."<sup>88</sup>

In contrast, psychologists, psychotherapists, and others have found among lawyers heightened needs for certainty and orderliness,<sup>89</sup> for financial security,<sup>90</sup> and for the esteem of others<sup>91</sup>—none of which form a good foundation for a high-risk resistance to dictatorship. In any economic system—even one that calls itself socialist—lawyers as a group form a kind of gentry, with the concerns about respectability and appearances that reached their apotheosis in the Victorian middle class.<sup>92</sup> The passions that inform (and inflame) an intelligentsia, on the other hand, are more artistic or philosophical than professional.

## V. NONVIOLENT RESISTANCE TO TOTALITARIAN REGIMES

Nearly all of the American debate about civil disobedience has been centered around the question of whether, in a relatively free society, it is

88. J. GARDNER, ON BECOMING A NOVELIST 34 (1983).

89. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 101 (1968). See also TOCQUEVILLE, *supra* note 76, at 273 ("certain habits of order, a taste for formalities"). Law seems to attract bureaucratic, rule-enforcement oriented temperaments. See Sternberg, *Prototypes of Competence and Incompetence in COMPETENCE CONSIDERED* 117, 140 (R. Sternberg & J. Kolligan ed. 1990).

90. Condlin, *The Moral Failure of Clinical Legal Education* in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 317, 330 (D. Luban ed. 1984); Leete, Francia & Strawser, *A Look at Lawyers' Need Satisfaction*, 57 A.B.A.J. 1193 (1971).

91. Condlin, *supra* note 90, at 330; Reich, *California Psychological Inventory: Profile of a Sample of First-Year Law Students*, 39 PSYCHOLOGICAL REP. 871 (1976).

92. Gandhi practiced law for twenty years. A 1913 photograph—taken near the end of this period—shows him seated outside his Johannesburg law office in a well-tailored three-piece suit, with the smile of a confident and prosperous professional and surrounded by a handful of employees in equally formal but less dashing clothing. The words "M.K. Gandhi, Attorney" are boldly painted on a window. In another photograph, taken eighteen years later at the London conference convened by the British government in a purported attempt to resolve the Indian crisis, the prime minister and a sizeable crowd of cabinet and lesser officials of the British Empire are seated with a few representatives from India in an ornate room in St. James's Palace. Every figure but one is staring intently at the camera in a show of purposefulness. Gandhi is looking downward, perhaps lost in thought; his face seems to show puzzlement or contemplation or both. But he stands out in this scene for a more obvious reason: he is the only person wearing nothing but a sheet. (The photographs appear at R. PAYNE, THE LIFE AND DEATH OF GANDHI 192 ff. (1969).) See also M. GANDHI, THE STORY OF MY EXPERIMENTS WITH TRUTH 167-68 (1954).



morally defensible to provoke change through obstructive resistance (albeit nonviolent), rather than through electioneering and lobbying. This question was examined with particular thoroughness throughout the period of student demonstrations against the Vietnam War and the preceding period of civil rights demonstrations.<sup>93</sup> Along the way, it has always been assumed that civil disobedience has an effect only on an adversary who has significant inhibitions based on democratic traditions—in the American South, for example, or in India under the British Raj<sup>94</sup>—and that nonviolent resistance is entirely useless against a totalitarian regime. Even before 1989, there was some evidence that at least in certain circumstances that assumption is wrong.<sup>95</sup> Although perhaps only tentative suggestions can now be made about what those circumstances might be,<sup>96</sup> nonviolent resistance, aside from its moral value, may be much more powerful *as a strategy* than generally believed, even against dictatorships.

The decisive idea of the Czechoslovak uprising was expressed in the parable of the greengrocer in Vaclav Havel's essay *The Power of the Powerless*,<sup>97</sup> which the samizdat network distributed throughout the country while he was incarcerated for his work with Charter 77. Havel's hypothetical greengrocer receives from the state a poster reading "Workers of the World, Unite!" which he automatically places in the shop window "because everyone does it, . . . because that is the way it has to be,"

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93. See, e.g., A. BICKEL, *THE MORALITY OF CONSENT* 91-123 (1975); *CIVIL DISOBEDIENCE: THEORY AND PRACTICE* (H. Bedau ed. 1969); *REVOLUTION AND THE RULE OF LAW* (E. Kent ed. 1971); Arendt, *Civil Disobedience* in *IS LAW DEAD?* 212 (E. Rostow ed. 1971).

94. Because of the kind of memory distortion that causes the more unrealistic forms of nostalgia, we may overestimate the amount of civilized behavior inherent in both these examples. In India, the British "were far more brutal in repression than is today remembered. People not only suffered in foul prisons and prison camps, but literally had their skulls cracked in beatings with steel-shod bamboo rods . . . and were shot while demonstrating"—as at Amritsar, where the British army killed 379 people by opening fire, without warning, on "unarmed Indians holding a peaceful meeting." SHARP, *supra* note 43, at 12 (1979). To the extent the British acted with restraint in India, that "may be related more to the peculiar problems posed by a nonviolent resistance movement and to the kind of forces [thus] set in motion, than to the opponent being 'British.' The same people showed little restraint in dealing with the Mau Mau in Kenya. . . ." *Id.*

And during the long period when blacks in the American South could be beaten or lynched with impunity, they might not have noticed that their lives were seriously affected by any inhibitions based on democratic traditions. Those who worked with the Southern Christian Leadership Conference and allied groups such as the Student Nonviolent Coordinating Committee always knew their lives were constantly in danger. See A. FAIRCLOUGH, *TO REDEEM THE SOUL OF AMERICA: THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND MARTIN LUTHER KING, JR.* 101 (1987); D. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 173-268, 357-430 (1986). Chaney, Goodman, and Schwerner were murdered; Medgar Evers was murdered; Viola Liuzzo was murdered; people whose names never reached national attention were murdered; countless demonstrators and potential demonstrators were shot at and beaten by whites, individually, in small groups, and in mobs; and finally Martin Luther King, Jr. was murdered. See FAIRCLOUGH, *passim*; GARROW, *passim*; M. VORST, *FIRE IN THE STREETS* 222, 258-59 (1979).

95. See *infra* text accompanying notes 121-37.

96. See *infra* text accompanying notes 145-48.

97. HAVEL, *THE POWER OF THE POWERLESS*, *supra* note 8, at 23.

because “[i]f he were to refuse, there could be trouble.”<sup>98</sup> There would in fact have been a lot of trouble. The regime would not have been able to tolerate a refusal that would have revealed that those who complied were “living a lie,” and—if it were to have gone unpunished—would have revealed further that “it is possible to live within the truth.”<sup>99</sup> It was not just the hapless greengrocer whose obedience would have helped others to be obedient. It was also the obedience of all who served on the normalization committees and their successors, performing—with professed regret—the distasteful duty of identifying ideologically unreliable citizens; and the obedience of the supervisors who dutifully fired those so identified; and the obedience of the lawyers who prosecuted them and of the judges who sentenced them; and so on.

The parable of the greengrocer grew out of the long, frustrating, and seemingly quixotic efforts of Charter 77, a very small group which, beginning on January 1, 1977, did nothing other than issue hundreds of documents, each demanding that the regime in one way or another tell the truth or live up to its own statutes and treaties.<sup>100</sup> Without any of the mass activity of Solidarity in Poland and “abstaining even from demonstrations, [Charter 77] confined itself to the written word. Its documents were, the Chartists believed, carefully studied by the authorities,” who felt compelled to react to them in the media and in actions both negative and positive.<sup>101</sup> In that way, the Chartists began to some extent to set the agenda for public discourse, asking people to “call things by their real names,”<sup>102</sup>—and provoking the regime to require the entire population to sign an “anti-Charter.” “They confined themselves to extremely simple moral acts [such as] telling the truth[:] truth in itself is not a moral value, but to tell it in all circumstances is one of the highest. . . .”<sup>103</sup>

Havel argued that the greengrocer’s obedience was itself an oppression of anyone else who knew of it. As long as one obeys, others feel compelled to obey, and when many obey, all feel compelled to obey. The result is that “everyone in his or her own way is both a victim and a supporter of the system.”<sup>104</sup> But the contrary can also happen: if some

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98. *Id.*, at 27.

99. *Id.* at 40 (emphasis in original).

100. SKILLING, SAMIZDAT, *supra* note 29, at 47. See also HAVEL, THE POWER OF THE POWERLESS, *supra* note 8, *passim*.

101. SKILLING, SAMIZDAT, *supra* note 29, at 69-71.

102. Kusy, *Chartism and “Real Socialism”* in HAVEL, THE POWER OF THE POWERLESS, *supra* note 8, at 152, 169.

103. Todorov, *Post-Totalitarian Depression*, New Republic, June 25, 1990, at 23, 24.

104. HAVEL, THE POWER OF THE POWERLESS, *supra* note 8, at 37. During the years of seemingly quixotic opposition, Charter 77 was neither accepted by the public nor rejected by it. The public was somewhat sympathetic but troubled by the Charter’s challenge to the accommodations people had made and the self-delusions with which they reassured themselves. But eventually, the Charter became “a kind of gauge of honesty and courage against which people judged their own and others’ behavior . . . , nudging people to act more independently and decently.” SKILLING, SAMIZDAT, *supra* note 29, at 70. Like Rosa Parks’ refusal to give up a seat on a segregated bus in Montgomery, Alabama in 1955, it fit into the category of the seemingly quixotic gesture which

disobey, others will realize that "it is possible to live within the truth,"<sup>105</sup> and if many disobey—so many that they cannot all be punished—all can do so, virtually with impunity. "The power of the powerless greengrocer was to stop obeying and thereby to stop encouraging the obedience of others. . . . [This] was the decisive idea—the one that persuaded the public to rise up in the *manner* it did and that caused the regime to unravel in the *way* that it did."<sup>106</sup> The theory of the greengrocer did not create the uprising, which—typically—arose out of a revolutionary situation begun elsewhere and not of the revolutionists' making.<sup>107</sup> Instead, it determined the uprising's course and character and its ending, which came when the regime failed to prevent a general strike of a mere two hours' duration. The regime knew it was beaten because it had accepted Havel's analysis that if a sufficient portion of the public were to gain the emotional strength to decide when to obey and when not to do so, it was the regime itself that would become powerless. And once that was demonstrated, the regime simply gave up and resigned.<sup>108</sup>

Part of the difficulty in discussing civil disobedience or nonviolent resistance is that our conception of it does not extend much beyond vague images of people going limp in the arms of arresting police officers. Gandhi was quite impatient with the idea of *passive* resistance, which he considered a distortion of his technique, caused by the narrow cultural experience of Westerners and perhaps by confusion with the Quaker concept of bearing witness. "I [do] not believe in passive resistance," he said. "Satyagraha is something very active. It is the reverse of passive. Submission is passive and I dislike submission."<sup>109</sup> Our foggy historical memory of Gandhi is that of a mystic whose holiness affected politics in a strange oriental way difficult for Westerners to understand. But Gandhi was an insurrectionist plain and simple, and in his view nonviolent resistance was a technique of insurrection. "I *was* a believer in the politics of petitions, deputations, and friendly negotiations," he said during the march to the sea in 1930 to make salt. "But [in practice] all these have gone to the dogs. I know that these are not the ways to bring this Gov-

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appears futile—even self-destructive—when it occurs, but afterward can be seen to have galvanized resistance or otherwise changed the character of the conflict.

105. *Id.* at 40 (emphasis in original).

106. Neumann, *On Strategy*, 59 FORDHAM L. REV. 299, 343 n.124 (1990).

107. "Revolutionary situations are rarely the creation of revolutionists, who start in weakness; instead, the true skill of revolution is the recognition and exploitation of revolutionary situations created by others or by circumstances that are out of anyone's control." *Id.* at 303 n. 15.

108. Gandhi wrote that "it is not so much British guns that are responsible for our subjection as our voluntary co-operation." *Quoted in* SHARP, *supra* note 43, at 47. "To blame [the British] for this is to perpetuate their power." *Id.* at 46-47. "[N]o Government can exist . . . without the co-operation of the people, willing or forced, and if people suddenly withdraw their cooperation in every detail, the Government will come to a stand-still." M. GANDHI, NON-VIOLENT RESISTANCE (SATYAGRAHA) 157 (1951).

109. L. FISCHER, GANDHI AND STALIN 50 (1947). *See also* Gandhi, THE ORIGINS OF SATYAGRAHA DOCTRINE IN THE QUIET BATTLE: WRITINGS ON THE THEORY AND PRACTICE OF NON-VIOLENT RESISTANCE 30, 37-39 (1963).

ernment round. *Sedition has become my religion.*"<sup>110</sup>

Nonviolent resistance tries to convert the adversary's greatest strength—his willingness and capacity to inflict brutality—into weakness.<sup>111</sup> If both sides are violent, each gains justification and moral reassurance from the other's violence,<sup>112</sup> and each side's violence confirms some or all of the other's propaganda directed at third parties.<sup>113</sup> But if one side refuses to fight and instead offers to suffer, the adversary, out of bewilderment, begins to lose confidence that he is justified—begins, in other words, to lose a vicious combative energy—and each further act of violence exposes him to third parties as brutal.<sup>114</sup> In the American civil rights movement, this was referred to as "‘moral jujitsu,’ a way of rattling the opponent and encouraging him to commit discreditable deeds."<sup>115</sup>

One of the worst defeats of the American civil rights movement was in Albany, Georgia, where the adversary was not confused and instead designed its tactics to match nonviolent resistance with unyielding but nonviolent—and therefore seemingly reasonable—assertions of power. The result was to turn the strategy of bewilderment around and use it aggressively against nonviolent demonstrators themselves. Unlike "Bull" Connor, the Commissioner of Public Safety in Birmingham, who ordered police to assault demonstrators—many of them children—with clubs, dogs, and high-pressure fire hoses, and unlike Sheriff James Clark in Selma, whose "Bloody Sunday" police charge on peaceful demonstrators on the Edmund Pettus Bridge stunned the nation, Laurie Pritchett—the police chief of Albany—trained his officers in the art of arresting

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110. Quoted in SHARP, *supra* note 43, at 50 (emphasis added). The mysticism surrounding Gandhi's idea of nonviolent resistance, or satyagraha, obscures his own thoughts about its use as strategy. He generally presented satyagraha as though it were inseparable from his ascetic philosophy as a whole, which is based, among other things, on the premise that "the world of solid objects is an illusion to be escaped from." Orwell, *Reflections on Gandhi* in COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL, VOL. IV: IN FRONT OF YOUR NOSE, 1945-1950, at 466 (S. Orwell & I. Angus ed. 1968). But he also plainly thought of it as strategy, using military metaphors in setting out its precepts. He called satyagrahi "a nonviolent army," GANDHI, NON-VIOLENT RESISTANCE, *supra* note 108, at 86, 98, 100, who must "behave like disciplined soldiers," *Id.* at 56. We will probably never know whether this was simply an instance of an idea fulfilling two functions, whether it was a form of rationalization and self-justification novel to us only because we are outside its cultural references, or whether it was a cynical packaging of strategy as spirituality. "Saints should always be judged guilty until they are proved innocent," Orwell wrote of Gandhi, and "inside th[is] saint, or near-saint, there was a very shrewd, able person." Orwell, *supra*, at 463. Civil disobedience may have been Gandhi's way of refusing to debase himself upon entering politics, "which of their nature are inseparable from coercion and fraud." *Id.* Civil disobedience is, after all, truthful persuasion, and the word satyagraha itself means the force of truth or "insistence on truth." GANDHI, NON-VIOLENT RESISTANCE, *supra* note 108, at 3, 78.

111. See FAIRCLOUGH, *supra* note 94, at 7.

112. R. GREGG, THE PSYCHOLOGY AND STRATEGY OF GANDHI'S NONVIOLENT RESISTANCE 5 (1929).

113. *Id.*

114. *Id.* at 18-20.

115. FAIRCLOUGH, *supra* note 94, at 237. The Southern Christian Leadership Conference often tried to provoke "dramatic violence" which would morally discredit its adversaries. *Id.* at 229.

demonstrators with disarming courtesy and gentleness. "I researched Dr. King. I read about his early days in Montgomery, his methods there. . . . For a period of four to five months [before demonstrations began in Albany] members of the Albany Police Department . . . were lectured and shown films [at each roll call] on how to conduct themselves. . . ." <sup>116</sup> Pritchett's unyielding but relentlessly polite arresting machine so exhausted and demoralized the Southern Christian Leadership Conference and the Student Nonviolent Coordinating Committee that their uneasy collaboration fell into bickering and mutual recrimination. <sup>117</sup>

The strategic power of civil disobedience—its capacity both to wound and to seduce the adversary—comes from the opposite of belligerence: a need to build or repair relationships; to find what Carol Gilligan calls "the inclusive solution" <sup>118</sup> (one which satisfies the needs of all who are involved); and to break through to and "connect" with the adversary, freeing the adversary from the role of oppressor as well as oneself from the role of the oppressed. Gandhi considered satyagraha to be an extension into politics of the principles of responsible family life, in which disobedience, when it occurs, is mixed with regret and longing for ways to repair damage to relationships based on affection and respect. <sup>119</sup> Although it may be, as Orwell wrote, "difficult to see how Gandhi's methods could be applied in a country where opponents of the regime disappear in the middle of the night and are never heard of again," <sup>120</sup> let us take an extreme example: Nazis intent on committing the mass murder of Jews in a country whose non-Jewish population refuses to permit it and refuses at the same time to fight over the issue.

When the Nazis invaded Denmark in April 1940, they demanded that the Danish government accept military occupation in an ultimatum which ended with the following words: "the Government of the Reich assures the Royal Danish Government that Germany has no intention now or in the future of encroaching upon the Kingdom of Denmark's territorial integrity or political independence." <sup>121</sup> This was, of course, a lie, although for reasons of expediency the Nazis—who were then fighting in Norway and about to invade France—temporarily allowed the

116. Quoted in FAIRCLOUGH, *supra* note 94, at 101. See also *id.* at 85-109 (Albany), 111-39 (Birmingham), 225-51 (Selma), as well as GARROW, *supra* note 94, at 173-268, 357-430 (1986).

117. FAIRCLOUGH, *supra* note 94, at 20, 106-9.

118. Remarks by Gilligan in *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 45 (1985). See also C. GILLIGAN, IN A DIFFERENT VOICE 25-37 (1982). Havel's "habit of forgiveness—the mother's riposte to the father's rule of law—is one of the signs of his leadership." Malcolm, *THE WINDOW-WASHER*, NEW YORKER, Nov. 1990, at 56, 102.

119. GANDHI, NON-VIOLENT RESISTANCE, *supra* note 108, at 19. When a revolutionary movement succeeds through conspiracy and violence, the government it establishes is often marked by the same characteristics. Open civil disobedience protects not only the morality of the revolutionaries, but also the morality of their success.

120. Orwell, *supra* note 110, at 468-69.

121. L. YAHIL, *THE RESCUE OF DANISH JEWRY* 32 (1969).

Danish government to continue to function internally. But the Danes seized on these words and insisted on compliance—through calm and principled discourse remarkably like that prescribed by Fisher and Ury<sup>122</sup>—in what the Danes came to call “the policy of negotiation.”<sup>123</sup> Throughout that period, although the Danes had to make many concessions, they refused to compromise on two points which they considered essential: first, that the only police force operating in the country would be the Danish one already in existence, which would enforce Danish law and no other, and, second, that no Danish Jew would be harmed in any way.<sup>124</sup>

For more than three years, this created an atmosphere in which the Nazis stationed in Denmark constantly had to justify themselves with arguments which eventually they themselves began to disbelieve. The result was that Berlin continually found that the German officials assigned to Denmark “became unsure of themselves and were no longer reliable.”<sup>125</sup> And when those officials were replaced, their replacements became unreliable as well.<sup>126</sup> Eventually, “even the men of the Gestapo began sabotaging orders from Berlin”<sup>127</sup> because they felt a need “to appear as decent people in Danish eyes.”<sup>128</sup> But when Copenhagen shipyard workers went out on strike in August 1943, Berlin could tolerate it no longer and ordered that the country be placed under the equivalent of martial law and that the long-delayed seizure of the Danish Jews for deportation to the death camps be planned in secret for the night of October 1.<sup>129</sup>

When Eichmann’s operatives arrived in Copenhagen to work out the

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122. R. FISHER & W. URY, *GETTING TO YES* (1981).

123. YAHIL, *supra* note 121, at 32-126, 147-54.

124. *Id.* at 42-52. In other occupied countries, local gentiles reacted to the Holocaust in any of three ways. Some tried to save Jews individually or in small numbers, “double-dealing and double-crossing” the Nazis but without publicly “contest[ing] the policy as such.” ARENDT, EICHMANN, *supra* note 48, at 171. (“[O]nly the Danes dared speak out on the subject to their German masters.” *Id.* at 171. See also YAHIL, *supra* note 121, at xix.) A second and perhaps the largest group did not care or were afraid to care about what happened to their Jewish neighbors and therefore ignored the entire question. But much of the time, local gentiles were themselves actively anti-Semitic and collaborated—often eagerly—in rounding up Jews, stealing their possessions, and cheering as they were removed from sight by the Nazis. In Poland, Hungary, and Romania, the Holocaust supplanted local persecutions already in progress when the war began. E. MENDELSON, *THE JEWS OF EAST CENTRAL EUROPE BETWEEN THE WORLD WARS* 68-81, 112-24, 202-10 (1983). The Romanians grew so impatient for their Jews to be taken away that they decided to do it themselves, typically packing thousands of people “into freight cars and letting them die there of suffocation while the train traveled through the countryside without plan or aim for days on end,” after which “a favorite follow-up . . . was to expose the corpses in Jewish butcher shops.” ARENDT, EICHMANN, *supra* note 48, at 191. In this and similar ways, the Romanians killed nearly 300,000 Jews “mostly without any German help” until the Nazis “intervened . . . so that the killing could be done in what, according to them, was a civilized way.” *Id.* at 190, 192.

125. ARENDT, EICHMANN, *supra* note 48, at 187. See also *id.* at 172-73.

126. YAHIL, *supra* note 121, at 60-61, 67-83, 97-101, 115-16, 146-81, 266-68, 401-05.

127. ARENDT, EICHMANN, *supra* note 48, at 190. See also *id.* at 173, 175.

128. YAHIL, *supra* note 121, at 274.

129. See ARENDT, EICHMANN, *supra* note 48, at 172-73; YAHIL, *supra* note 121, at 122-30.

details of the operation, they found themselves in a situation which was unique. The Danes, who were occupied and defeated, were setting standards of behavior to which a number of German officials already on the scene felt obliged to conform, rather than the other way around. And some local German officials had been so subverted that they sabotaged the operation in two ways. First, they contrived orders that no home was to be broken into "because the Danish police might interfere," which, of course, meant that the forces Eichmann's operatives had to import hastily from Germany—because Germans already in Denmark were not trustworthy—"could seize only those Jews who voluntarily opened their doors."<sup>130</sup> And second, the advantage of surprise was lost because local German officials surreptitiously made sure that leading Danes knew what was going to happen. The result was that on the night designated for the seizure of all Danish Jews, the Nazis "found exactly 477 people, out of a total of more than 7,800, at home and willing to let them in."<sup>131</sup>

What followed was a mass rescue—spontaneously organized by Danes—of nearly all the Jews still being hunted by Nazis. This required finding people who were in hiding, transporting them secretly to coastal fishing villages, and taking them to Sweden at night in the holds of small fishing boats—all of which consumed the month of October 1943.<sup>132</sup> Virtually every significant organization in Denmark protested to the Germans, some even before the operation began (on the basis of information leaked by Germans themselves).<sup>133</sup> "The Germans stood astounded and to some degree helpless before this strange phenomenon."<sup>134</sup> They seemed unable to defend themselves when challenged on moral grounds,<sup>135</sup> and Eichmann later recalled with bitterness that "[t]hat small country caused us more difficulties than anything else."<sup>136</sup>

130. ARENDT, EICHMANN, *supra* note 48, at 173. See also YAHIL, *supra* note 121, at 172.

131. ARENDT, EICHMANN, *supra* note 48, at 173.

132. See YAHIL, *supra* note 121, at 237-82; R. PETROW, THE BITTER YEARS: THE INVASION AND OCCUPATION OF DENMARK AND NORWAY, APRIL 1940-MAY 1945, at 212-23 (1974). This was "the greatest mass rescue operation of World War II." PETROW, *supra*, at 216.

133. YAHIL, *supra* note 121, at 230-31. The Danish church sent to the Germans a letter of protest which was read from the pulpit in every church in the country at Sunday services a day and a half after the operation began. *Id.* at 235. The letter concluded with the following statement: "[W]e shall therefore struggle to insure the continued guarantee to our Jewish brothers and sisters of the same freedom we ourselves treasure more than life itself. . . . We will therefore unambiguously declare our allegiance to the doctrine that bids us obey God more than man." *Id.* at 236. "I would rather die with the Jews than live with the Nazis," a typical pastor told his congregation. H. FLENDER, RESCUE IN DENMARK, 69 (1963).

134. YAHIL, *supra* note 121, at 278. Many Germans simply "acquies[ced] in the escape of the Jews." PETROW, *supra* note 132, at 226. Troops frequently looked the other way, and naval patrol boats were at times kept in port on the spurious excuse that they needed repairs. See *id.* and YAHIL, *supra* note 121, at 267-68.

135. The histories of the rescue are replete with scenes like this: a student driving a car filled with escaping refugees was stopped by a German patrol, and everyone was ordered out. "Be human," the student told the German soldier who was giving orders. "We have children with us." The German looked into the car and told the student to drive on. PETROW, *supra* note 132, at 227 (emphasis added).

136. PETROW, *supra* note 132, at 213-14. In every other occupied country (except Bulgaria), the

Hannah Arendt observed that this was “the only case we know of in which the Nazis met with *open* native resistance, and the result seems to have been that those exposed to it changed their minds. . . . They had met resistance based on principle, and their ‘toughness’ had melted like butter in the sun. . . .”<sup>137</sup> This has been attempted so infrequently that we can have only the vaguest and most tentative ideas of the circumstances in which civil disobedience might debilitate “an opponent possessing vastly superior means of violence.”<sup>138</sup> But certain prerequisites seem apparent.

First (and obviously), a large proportion of the population must be willing to risk arrest, physical injury, and perhaps death. If the regime has been inaccurately evaluated, a peaceful demonstration can turn into a bloodbath (as it did in Petersburg in 1905). Civil disobedience can require even more physical courage than violent resistance would: it is, after all, an offer to suffer, if necessary, the adversaries’ brutality. And successful nonviolent resistance is a mass activity. The numbers involved have to be so large that the adversaries feel the sensation of sand being swept away from under their feet.

Second, the resisters must act with calm, self-discipline, and cohesiveness (which, paradoxically, seem most effective when achieved spontaneously). If civil disobedience is “a way of defeating the enemy without hurting him and without feeling or arousing hatred,”<sup>139</sup> large numbers of people have to be firm without showing either anger (which prevents the adversaries from listening and incites their desire to fight) or fear (which incites their desire to inflict cruelty).<sup>140</sup>

Third, throughout their actions and discourse, the resisters must both enunciate and illustrate the principles of civic behavior to which they demand that their adversaries conform. It is this demand for morality that so shocks adversaries who otherwise think of raw power and submission. But it lacks credibility unless reflected in the resisters’ own conduct so convincingly that the adversaries come to fear the possibility of their own moral inferiority.

Fourth, the resisters’ actions must be designed to shatter their adversaries’ confidence and ultimately to demoralize them.<sup>141</sup> Civic Forum used

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proportion of Jews who perished was vastly greater than it was in Denmark. In some countries, it was as high as 70 or 80 per cent. See ARENDT, EICHMANN, *supra* note 48, *passim*. The Danish figure was less than two per cent. See YAHIL, *supra* note 121, at 318-19. This seemed so miraculous at the time that embellishments and legends—such as the fable about the Danish king volunteering to wear the yellow star—were invented almost immediately to explain it. See YAHIL, *supra* note 121, at xiii, 61-64; PETROW, *supra* note 132, at 227-29.

137. ARENDT, EICHMANN, *supra* note 48, at 175 (emphasis in original). There may have been isolated communities elsewhere where similar behavior had the same result. See P. HALLIE, *LEST INNOCENT BLOOD BE SHED* (1979) (the French village of Le Chambon).

138. ARENDT, EICHMANN, *supra* note 48, at 171.

139. Orwell, *supra* note 110, at 467.

140. GREGG, *supra* note 112, at 27.

141. For lack of this prerequisite, most of the strikes, demonstrations, and other forms of civil



sound strategic judgment in shaping its general strike, accurately believing that the decisive event—the one that would mortally wound the regime—would be a demonstrated proof that the workers were no longer willing to acquiesce in the status quo. The strike was defined to do that without hurting the economy or the workers' own incomes. (It was timed to begin at noon and to last only two hours.) Civic Forum and the students concentrated their efforts around this decisive event and did not waste them elsewhere. They thus caused "a strategic dislocation,"<sup>142</sup> so great that the regime was checkmated with nearly all its pieces still on the board—its army, its police, and all its weaponry complete and intact.

Fifth, the resisters would have to come from a mature civic culture that values communality, shuns confrontation, and is devoid of swaggering and bravado. To the extent that a culture trivializes ideas of connection and the protection and nurturing of relationships (in ways which we are just beginning to understand through feminist literature), it is less likely to be able to engage in civil disobedience. And a cultural preference for problem-solving through humor and wit, rather than through exercises of power, seems somehow valuable, perhaps because it defuses the mutual defensiveness of confrontation.

Finally, as with all revolutions, the situation would have to be ripe, usually as a result of factors beyond the insurrectionists' control. Perhaps most important in this respect, the totalitarian regime would have to have lost some of its paranoia. Gandhi "seems wherever possible to have believed that other people . . . had a better nature through which they could be approached,"<sup>143</sup> which "is not necessarily true . . . when you are dealing with lunatics,"<sup>144</sup> and for that reason civil disobedience would have been an impossible strategy in the Soviet Union during the Great Terror of the 1930's and for a long time thereafter. But by 1989 most of the Soviet regimes in Europe had been in power so firmly and for so long—after so much propaganda had been believed and so many habits of obedience had been developed—that the employment of rough measures had become more a matter of administrative routine than of political hysteria.<sup>145</sup> In Denmark, a similar evolution happened much

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disobedience in occupied Europe during the Second World War gained little tangible strategic advantage other than preserving the integrity and sometimes raising the morale of local people while occasionally depriving the occupiers of the delusion that their presence might actually be wanted. See J. HAESTRUP, *EUROPEAN RESISTANCE MOVEMENTS, 1939-1945*, at 76-146 (1981).

142. B. LIDDEL HART, *STRATEGY* 339-40 (2d Rev. Ed. 1967).

143. Orwell, *supra* note 110, at 464.

144. *Id.* at 469.

145. After in their early years crushing all significant opposition, the regimes in East Central Europe developed a mentality which Havel called "post-totalitarian." HAVEL, *THE POWER OF THE POWERLESS*, *supra* note 8, at 23, 24-27. "I do not wish to imply by the prefix 'post-' that the system is no longer totalitarian; on the contrary, I mean that it is totalitarian in a way fundamentally different from classical dictatorships, different from totalitarianism as we usually understand it." *Id.* at 27. Before reaching this state, a regime is so fearful of overthrow that irrational amounts of energy are expended terrorizing its subjects and intimidating outsiders. But after a long time with

more quickly and for very different reasons. There, the occupiers had been deluded into a sense of security by their quick victory in 1940, before the period of negotiation put large numbers of them in firm contact with moral reality—something that was impossible in the hysterical atmosphere inside Germany itself and in other occupied countries where the Nazis were exclusively concerned with shooting at saboteurs, rather than trying to justify to the local inhabitants their every act.

The Dutch, for example, wanted to save Jews every bit as much as the Danes did. “Holland had been the only country in all Europe where students went on strike when Jewish professors were dismissed and where a wave of strikes broke out in response to the first deportation of Jews to German concentration camps.”<sup>146</sup> But three-quarters of the Jews in the Netherlands died in the Holocaust.<sup>147</sup> Paradoxically, this may have been because initially the Dutch fought harder. They were better armed in 1940, and when invaded, they defended more fiercely and were more soundly defeated. From the beginning in the Netherlands, the relationship between the occupiers and the occupied was one of violent confrontation, precluding the incessant moral demands that in Denmark so disarmed the Nazis psychologically. In fact, when one considers what could have happened in Denmark and in Czechoslovakia if violent means had been used, nonviolent resistance can in some circumstances be seen to be the *only* effective strategy against a totalitarian regime.

Those of us who were student radicals in the United States in the 1960’s must admit that we were never as effective as the Czechoslovak students of 1989.<sup>148</sup> Not in our wildest dreams could we have imagined bringing down a totalitarian government in two or three weeks,<sup>149</sup> even if we had had a first-class intelligentsia to work with (which we certainly did not). Nor—crippled by dilettantism and suburban piffle—would we

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these methods, even the regime eventually begins to see that it has been so successful that there is little any more to be paranoid about. Paradoxically, it is at this point that the regime becomes vulnerable for the first time to a kind of resistance that would have been unthinkable when it felt less secure.

146. ARENDT, EICHMANN, *supra* note 48, at 169.

147. *Id.* at 167-70.

148. Not all Czechoslovak students were active in this uprising. In fact, in several schools and departments only a minority were. Because the children of Party members got preferential admission to the university—even if they were in no way intellectually qualified for university study—and because those same children could have expected similar treatment for the rest of their lives, many were simply too indebted to the status quo to ask themselves hard questions about the society in which they lived. And a number of students—content with the ease of study under poorly qualified teachers who barely knew the material themselves—can be counted upon to resist educational reforms that will introduce the demands from which deeper learning results.

149. Although the Czechoslovak students were aware of what was happening elsewhere in East Central Europe, the regime had at its disposal one of the most efficient secret police organizations in the region, together with an army and a well trained regular police force—all equipped with armored personnel carriers, tanks, crowd-control water cannons, and every other kind of hardware needed to perpetuate itself. And the Massacre itself was hardly the kind of excess from which not even a dictatorship can recover. Film of the Massacre shows an event no more shocking than any of dozens, perhaps hundreds of confrontations between demonstrators and police in the United States in the 1960’s and 1970’s.

have been able to persuade a blue-collar class to take the terrible risks of a treasonous general strike.

Why were the Czechoslovak students able to do it? To begin with, they understood how people in the working class think. Revolutionists are sometimes given their strongest assets by the very regimes they overthrow. For the most part, the Czechoslovak students were themselves the children of workers. (The regime went to enormous and often cruel efforts to break the cycle, prevalent in every Western country, through which bourgeois children go to university and working class children learn trades.) For much the same reason, they could speak to the workers as equals and in respectful and straightforward language that the workers could understand (rather than in the condescending rhetoric we might expect in a similar situation in the United States). Moreover, in Czechoslovakia the working class has traditionally had a strong respect for intellectual achievement, and thus the students spoke not only with empathy but also with authority. And cultural values based on feelings of solidarity had not been destroyed by normalization but had only gone into quiet eclipse. Atomism seems to be a permanent part of American culture, and more than one European has remarked that Americans find it almost impossible to understand the concept of solidarity (which may explain why the labor movement ultimately failed in this country). When Czechoslovak students showed videotapes of the Massacre and argued that workers should be able to see themselves and their children in such scenes, the workers could not easily isolate themselves with the rationalization that this was a problem affecting other people and with which they did not choose to get involved. And finally, the students fought all the harder because they could not afford to lose. Once they shut down the universities, they knew that if the regime remained in power they would all be purged and would face prison, a lifetime at menial labor, or both.

## VI. THE MIRROR<sup>150</sup>

One of the functions of comparativist analysis is to put a mirror to ourselves, to see how we appear in a wider context where our assumptions and illusions can be revealed (and where occasionally something we have taken for granted about ourselves turns out to be unique and praiseworthy). When we look into the mirror created by what the British are calling the Third Springtime of Nations,<sup>151</sup> what we see leaves us with—among many other things—troubling questions about the way our universities are governed.

150. See *supra* notes 16-24 and accompanying text.

151. The first two were 1848-49 and 1918-19. See T. GARTON ASH, *THE MAGIC LANTERN passim* (1990); Ascherson, *The Borderlands*, 30 *GRANTA* 41, 63 (1990).

In the United States, boards of trustees were originally vested with the ultimate authority to run colleges (and later, universities) because there was no permanent professoriate in a frontier society and because the first institutions of higher learning in America were founded by religious denominations eager to control the content of instruction.<sup>152</sup> Unable to visit the campus regularly, trustees delegated the bulk of their authority, either *de facto* or *de jure*, to the institution's president.<sup>153</sup> And when state legislatures began to create public universities, they copied the already existing structures of private schools.

The governance of universities by boards of lay people and their appointees occurs only in the United States and Canada.<sup>154</sup> It is inconsistent with the collegial governance that is a strength of American law schools, and at some universities the dichotomy between university hierarchical governance and law school collegial governance is a continual source of friction and controversy. Although American faculties have acquired some influence in practical ways over the running of universities—and although trustees and regents and their appointed presidents and chancellors have at times exercised excellent leadership—the fact remains that the *system* of placing the legal power to govern in boards of outside lay people and their designated administrators has been “one of the most decisive factors” in disrupting academic freedom and in inhibiting academic initiative in the United States.<sup>155</sup>

Moreover, trustees and regents are predominantly businessmen who believe that they and their appointed administrators—and not faculty—should exercise the primary authority to appoint deans, determine faculty leave policies, and make other academic decisions for which a business background provides no special competence<sup>156</sup> and may even provide the opposite. It is a peculiarity of our national folklore that “[t]he man who applies himself undeviatingly to pecuniary . . . gain, and who is habitually . . . alert to the main chance,” is assumed to be a source of wisdom on all questions, even those outside his narrow and limited

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152. HOFSTADTER & METZGER, *supra* note 14, at 114-208; R. PRATOR, *THE COLLEGE PRESIDENT*, 3-4 (1963). “[In] Colonial America . . . teaching staff members seldom were permanent. . . . Many college instructors were young tutors who themselves had recently graduated and who had taken up teaching merely as temporary employment while waiting for other positions. . . . [T]he president often would be one of the very few permanent members of a college staff.” PRATOR, *supra*, at 4 (1963).

153. PRATOR, *supra* note 152, at 3-4. Today, however, some of the increasing turnover among university presidents and chancellors is partly traceable to the accumulating tendency of modern boards to try to engage in active management of their universities. See *N.Y. Times*, July 25, 1990, at B7, col. 1.

154. HOFSTADTER & METZGER, *supra* note 14, at 120.

155. *Id.* at 120-21. American politicians—unlike their counterparts in Europe—have traditionally distrusted university teachers and have expected boards of regents to make sure that public universities do not offend certain sensitive blocs of public opinion. See, e.g., UNIV. OF CALIF. STUDY COMM’N ON UNIV. GOVERNANCE, *THE CULTURE OF THE UNIVERSITY: GOVERNANCE AND EDUCATION* 59-61 (1968); Hartnett, *supra* note 18, at 25-26.

156. Hartnett, *supra* note 18, at 29-30.

area of expertise.<sup>157</sup> Thus, the Platonic ideal, "which would have the philosophers take over the management of affairs, has been turned on its head; the men of affairs have taken over the direction of the pursuit of knowledge"<sup>158</sup>—in the process reducing each American faculty to "a body of employ  s, hired to render certain services and turn out certain scheduled vendible results."<sup>159</sup>

Although boards and their appointed administrators argue that lay governance is essential to the raising of money, we have no idea—in the absence of exhaustive empirical research—how much fund-raising is actually conducted by trustees and regents and how much of it could just as effectively be conducted by officials elected by and responsible to the academic community. Many law schools already have to conduct their own fund-raising without much assistance from trustees or regents. And at some universities, the funds raised by governing boards have been so meager and the efforts to raise them so insignificant as to present an argument that the board members involved occupy an honorific position with no material function other than to make decisions for which they have no special qualifications. Although it has similarly been argued that trustees and regents are needed to explain the university to and defend it from a hostile world,<sup>160</sup> the European experience amply demonstrates that academics are quite capable of explaining and defending themselves. In fact, they may be more capable than trustees and regents, who know less about university life and, in the case of regents, often have other loyalties influenced by politics.

Even worse are the arguments used to justify the exclusion of American faculty from voting membership on their own institutions' boards of trustees or regents. The following, for example, are advanced by the chancellor emeritus of a state university<sup>161</sup>: (1) In large universities, it would be impractical to put even representative faculty on governing boards. (*But just that is done all over Europe, and British governing boards are exactly the mixture of academics and lay people that is claimed in America to be impossible.*) (2) There are no reliable means of selecting faculty for this purpose. (*Elections have been used in Europe for a very long time.*) (3) Faculty do not have sufficient personal investment in the

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157. VEBLEN, *supra* note 23, at 72.

158. *Id.* at 77-78.

159. *Id.* at 92. Many European symphony orchestras are by tradition self-governing. The musicians themselves decide whom to hire as a conductor, and they elect (from their own membership) officers and committees to whom they delegate administrative responsibilities. American symphony orchestra musicians, by contrast, are mere employees who are relegated to fighting with management through their unions. The traditions differ because European orchestras were (and are) considered to be communities of artists entitled to autonomy, respect, and government subsidies that keep ticket prices affordable, while American orchestras were founded by wealthy patrons who treated musicians as servants.

160. Gould, *Trustees and the University Community* in *THE UNIVERSITY AS AN ORGANIZATION* 215, 216-18 (J. Perkins ed. 1973).

161. Gould, *supra* note 160, at 219-20.

future of their universities. (*But trustees and regents do?*). (4) Faculty on governing boards will advance their parochial interests at the expense of the university as a whole. (*That has hardly been the European experience.*)

Arguments like these are so easily refuted that one is left with the feeling that there is really only one reason why faculty are not represented on American governing boards: the idea is simply repulsive to trustees and regents and to their appointed presidents and chancellors, who seem unable to view scholars as anything other than employees in the industrial sense of the word.

The European system of university governance—the election by teachers of the university's chief executive officer and its governing body (on which teachers are themselves the voting majority)—is part of a system of autonomy and self-government that for centuries has been considered essential to intellectual integrity in an *institutional* sense. Hierarchy has its uses, but in many of our institutions—in universities, frequently in corporate life, even in symphony orchestras—it is relied upon unthinkingly and dysfunctionally. It may be no coincidence that in international competition our corporations are often handicapped with inefficiencies associated with rigidly hierarchical work environments.<sup>162</sup> And in university governance, a hierarchical style may exacerbate or even cause that which it is claimed to cure.<sup>163</sup> In many of those situations, it may in fact be that we continue to use hierarchical structures *because* they are ineffective. Hierarchy easily protects mediocrity from creative and competitive pressures. It did exactly that in the regimes that have been swept away in East Central Europe.

Especially when confronted with epic events, history prefers a long and patient wait to gain the advantage of perspective before passing judgment. While those events happen, one can only stand agape, entertaining the most tentative of inferences. But in the struggle to determine the form of governance that eventually will take hold in some of the East Central European countries, an influential—although perhaps not ultimately controlling—body of opinion wants something that in many small ways is more democratic and less disingenuous than the system and practices we take for granted. People who have risen up against one kind of hierarchy do not eagerly accept the imposition of another simply because it wears different clothing.<sup>164</sup> It may be that in the United States we have

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162. See, e.g., R. PASCALE & A. ATHOS, *THE ART OF JAPANESE MANAGEMENT* (1981).

163. The stress that increasingly burns out and demoralizes American university presidents and chancellors may be aggravated by their continual obligation, under current systems of governance, to conciliate factious constituencies that at present are able to assert their interests only through conflict with each other and with university administrators. See N.Y. Times, July 25, 1990, at B7, col. 1 (more frequent turnover among university presidents and chancellors makes these positions increasingly difficult to fill). But insightfully designed sharing of responsibility can itself generate conciliation in situations that otherwise would deteriorate into acrimony.

164. "IBM certainly works better than the Skoda plant, but that doesn't alter the fact that both

made some poorly considered assumptions about the extent to which hierarchy is associated with effectiveness and the extent to which we actually experience democracy in everyday life. Certainly, we have some hard questions to answer when we are confronted with university teachers in East Central Europe who revert after the fall of totalitarian regimes to previously *traditional* democratic prerogatives that are unheard of in the United States.

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companies have long since . . . turned man into a little cog in their machinery. . . . [T]he fact that IBM is capitalist, profit-oriented, and efficient, while Skoda is socialist, money-losing, and inefficient, seems secondary to me." HAVEL, *DISTURBING THE PEACE*, *supra* note 7, at 14.